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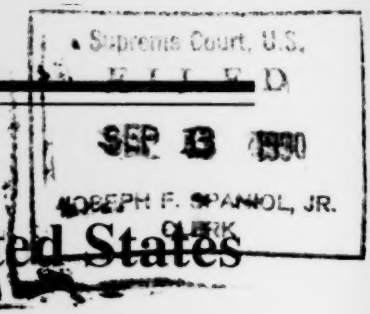

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD KEVIN BIAS, DECEASED,

Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. AND A. LEE FENTRESS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES R. EYLER*
CHARLES R. DIFFENDERFFER
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(301) 727-6464

WAYNE K. CURRY
MYERS, BILLINGSLEY, SHIPLEY, CURRY, RODBELL & ROSENBAUM, P.A.
Suite 400
6801 Kenilworth Avenue
Riverdale, Maryland 20737-1385
(301) 699-5800

**Counsel of Record*

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether evidence tending to show the bias, self-interest and lack of credibility of movants' sole evidence in support of its motion for summary judgment is sufficient to create a genuine issue of material fact.

II. Whether Rule 56 of the Federal Rules of Civil Procedure requires a non-moving party, which will not bear the burden of proof at trial, to produce direct rebuttal evidence to controvert movants' affidavits or whether circumstantial evidence can satisfy non-movant's burden.

III. Whether Rule 56 of the Federal Rules of Civil Procedure permits courts to

consider matters not raised or briefed by any of the parties below.

IV. Whether, if viewed in a light most favorable to non-movant, the results of numerous drug tests showing no trace of cocaine in Bias' system is sufficient to rebut testimonial evidence that he was a cocaine user.

V. Whether summary judgment is proper when movant offers only opinion evidence to support an essential element on which it will bear the burden of proof at trial.

VI. Whether Rule 56 of the Federal Rules of Civil Procedure permits a trial court to find, as a matter of law, that it is not feasible to negotiate

and complete an enforceable endorsement contract in one day.

VII. Whether Rule 56 of the Federal Rules of Civil Procedure permits a trial court to find, as a matter of law, that an agent's breach of loyalty and conflict of interest does not affect his ability to complete an enforceable endorsement contract in one day.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit (No. 89-7116) were Petitioner, James Bias, as personal representative of the Estate of Leonard Kevin Bias, Deceased, and Respondents, Advantage International, Inc. and A. Lee Fentress.

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1990

JAMES BIAS, as Personal Representative of the Estate of LEONARD KEVIN BIAS, Deceased

Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. and A. LEE FENTRESS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James Bias, personal representative of the Estate of Leonard Kevin Bias, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 905 F.2d 1558 and appears as Appendix A to this petition.

The District Court's ruling granting summary judgment to Respondents is unreported. The District Court's Order appears as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 15, 1990. This petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1). The original action was brought by Petitioner in the Superior Court for the District of Columbia. The

case was removed to the District Court for the District of Columbia by Defendants. The jurisdiction of the District Court was invoked under 28 U.S.C. 1332 because of diversity of citizenship, the Petitioner being a resident of Maryland, Respondents being residents of the District of Columbia, and Fidelity Security Life Insurance Company and Reebok International, Inc. being residents of Missouri and Massachusetts, respectively.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Seventh Amendment to the Constitution of the United States ("7th Amendment") and Rule 56 of the Federal Rules of Civil Procedure ("Rule 56). The 7th Amendment and Rule 56 are set forth in Appendix C.

STATEMENT OF THE CASE

From 1982 through 1986, Leonard Kevin Bias ("Len Bias") was a star basketball player for the University of Maryland. In the Spring of 1986, he entered into an agency relationship with Respondents, Advantage International Inc. ("Advantage") and A. Lee Fentress ("Fentress")(collectively, the "Defendants"). The Defendants agreed to act exclusively as Len Bias' personal agent, financial advisor and attorney. For their services Advantage and Fentress were to receive a percentage of Len Bias' earnings.

As part of their agency, the Defendants agreed to obtain for Len Bias a One Million Dollar ($1,000,000.00) life insurance policy. Subsequently, Fentress represented that he had secured the desired insurance coverage.

On June 17, 1986, the Boston Celtics drafted Len Bias as the second pick in the National Basketball Association ("N.B.A.") collegiate draft. Advantage and Fentress were responsible for negotiating certain contracts on his behalf, including basketball and product endorsement contracts. Prior to the N.B.A. draft, Reebok International Ltd. ("Reebok") expressed its desire to contract with Len Bias for his endorsement of their athletic shoes. Len Bias also desired a Reebok contract.

On June 18, 1986, the Defendants engaged in negotiations with Reebok for the desired endorsement contract. Reebok presented a form endorsement contract which Len Bias expressed to Fentress that he was willing to execute on that day. This form contract provided for an unconditional lump sum payment to be paid

at the execution of the contract. However, after sending Len Bias and his father from the room, Advantage and Fentress breached their duty of loyalty and negotiated with Reebok on behalf of other clients. Because Defendants had diverted the negotiations, they were unable to secure an contract on that day. To conceal their actions and breaches of fiduciary duty, Advantage and Fentress misrepresented to Len Bias that an enforceable endorsement contract had been completed, and, in fact, relayed to Bias and his father the terms of the contract.

One day later, in the early morning of June 19, 1986, Len Bias died as a result of cocaine intoxication. It was discovered soon after Len Bias' death that, despite their representations, the Defendants had not secured the life insurance policy. It was also discovered

that, despite their representations, the Defendants had failed to complete an enforceable Reebok endorsement contract.

James Bias, personal representative of his son's estate ("the Estate"), brought suit against Advantage and Fentress alleging, inter alia, breach of contract, breach of fiduciary duty, negligence, fraud and negligent misrepresentation.[1] A jury trial was prayed.

The Defendants moved for summary judgment and alleged that, as a matter of law, Len Bias was an uninsurable cocaine user. The Defendants argued, therefore, that they were not liable for their failure to secure a life insurance policy

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[1] **The Estate also brought suit against Fidelity Security Life Insurance Company ("Fidelity") and Reebok. The District Court awarded summary judgment to both Fidelity and Reebok; Petitioner did not appeal these judgments.**

regardless of their agreement to do so. Further, the Defendants argued that they were not liable for their breaches of fiduciary duty and conflict of interest, it was not reasonable to expect that such an agreement could have been completed on the same day negotiations were held.

With regard to the insurance issue, the Defendants offered the testimony of Terry Long and David Gregg, admitted cocaine users, who stated that Len Bias used cocaine on various, yet unspecified, occasions prior to his death. The Estate showed, however, that Long and Gregg had altered their testimony regarding Bias' alleged drug use in order to obtain immunity from criminal prosecution. Upon cross-examination at the trial of Brian Tribble, Long and Gregg themselves admitted the calculated change in their testimony. Portions of the Brian Tribble

trial transcript reflecting the cross-examination of Long and Gregg are attached hereto as Appendix D and E, respectively.[2]

In further rebuttal of this patently unreliable and self-interested testimony, the Estate offered the Affidavits of Len Bias' mother and father and his collegiate basketball coach, Charles "Lefty" Driesell, who testified as to their close relationship with Len Bias and their knowledge that Len Bias did not use drugs. Further, the Estate introduced the results of drug tests administered by the University of Maryland, Boston Celtics and New York

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[2] **The appended portions of trial testimony were not part of the record before the United States Court of Appeals for the District of Columbia Circuit though other portions of the Long and Gregg testimony were a part of the record. The testimony appended hereto is intended to be purely a reflection of those arguments raised below by the Estate.**

Knickerbockers which conclusively establish that Len Bias was completely free of drugs from 1982 to the time of his death.

Judge Revercomb of the U.S. District Court for the District of Columbia granted the Defendants' Motion for Summary Judgment by an Order dated November 8, 1988 (hereinafter, the "Order"). Appendix B. The District Court held, as a matter of law, that Len Bias was a cocaine user and that, without exception, cocaine users are uninsurable. Appendix B at pp. 27-31. Further, the Court found, as a matter of law, that Fentress and Advantage could not have obtained a written contract with Reebok prior to Bias' death. Appendix B at pp. 31-32.[3]

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[3] The District Court also held that Fentress acted only in an official capacity as an officer of Advantage and therefore could not be

THE DECISION BELOW

On appeal, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the Order. The Court determined that the Defendants had met their affirmative burden by offering the testimony of Terry Long and David Gregg. The D.C. Circuit held that the Estate, as non-movant, was then required to rebut Defendants' showing with direct evidence; the circumstantial evidence of Bias' parents and coach was held insufficient. The D.C. Circuit advised that

> rebuttal testimony either must come from persons familiar with the particular events to which the defendants' witnesses testified ...

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personally liable for his actions. Appendix B at p. 32-34. The Estate appealed this issue as well to United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit, having affirmed the grant of summary judgment on the other issues, did not address the issue of Fentress' personal liability.

905 F.2d at 1561; Appendix A at p. 13. Further, the D.C. Circuit dismissed the results of the drug tests offered by the Estate.

> The drug test results offered by the Estate may show that Bias had no cocaine in his system on the dates when the tests were administered, but, as the District Court correctly noted, these tests speak only to Bias' abstention during the period preceding the tests.

905 F.2d at 1561-62; Appendix A at pp. 15-16. The D.C. Circuit, therefore, affirmed that the Estate had failed to sufficiently rebut the testimony of Long and Gregg.

Having affirmed that Bias was, as a matter of law, a cocaine user, the D.C. Circuit further affirmed the District Court's determination that in 1986 no life insurance policy was available to cocaine users. Appendix A at pp. 17-21. The Defendants' sole evidence in support

of this essential element of their uninsurability claim was the opinion testimony of two experts. The D.C. Circuit acknowledged that in rebuttal the Estate offered the testimony of its own experts in rebuttal, but the Court held that the Estate failed to meet its burden to show the existence of any insurance company which would have issue a life insurance policy to a drug user. Appendix A at pp. 17-21.

With regard to the Reebok contract issue, the D.C. Circuit affirmed that it is not feasible for an enforceable endorsement to be negotiated and completed in one day. Appendix A at pp. 22-23. The Court held that even if the defendants breached their fiduciary duties and maintained a conflict of interest, a jury could not reasonably find that the defendants' actions

affected the feasibility of completing an enforceable endorsement contract on June 18, 1990. Appendix A at pp. 22-23.

REASONS FOR GRANTING THE PETITION

This is the paramount case dealing with the application of summary judgment procedure when the moving party will bear the burden of proof at trial. The trilogy of cases generally considered the cornerstones of summary judgment law, Celotex v. Catrett, Anderson v. Liberty Lobby and Matsushita v. Zenith (citations infra), each involved a movant which would not have the burden of proof at trial --- "defensive" use of Rule 56. This Court has not addressed the important subject of summary judgment law from the other side of the fence ---

"offensive" use.[4] Offensive use of Rule 56 is increasingly being utilized, and the lower courts are in dire need of direction from this Court. This case provides the Court with that unique opportunity. Review of this case will permit the Court to generally endorse offensive use of Rule 56, but will allow the Court, through reversal of this summary judgment in this case, to set guideline to protect a non-movant's right to trial.

This case merits the Court's review because the D.C. Circuit's opinion conflicts with the decisions of this

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[4] As Justice Brennan, in his dissent in Anderson v. Liberty Lobby, observed that the Court, through that decision, "change[d] summary judgment procedure for all litigants, regardless of the substantive nature of the underlying action." Though this Court changed summary judgment procedure, the logic and reasoning of those cases left unanswered questions in those cases in which the non-movant will not bear the burden of proof at trial.

Court, the D.C. Circuit and other Circuits and establishes dangerous precedent by:

1) requiring the non-movant to rebut movants' sole evidence though it is shown to be patently unreliable and biased by the self-interests of the witnesses;

2) requiring the non-movant to offer direct, rather than circumstantial, evidence to rebut movants' showings;

3) permitting a court, upon a motion for summary judgment, to consider matters not raised or briefed by any of the parties below;

4) failing to draw all reasonable inferences in favor of the non-movant;

5) granting summary judgment when movants' sole evidence regarding an issue essential to movants' claim is in the form of expert opinion; and

6) infringing upon a litigant's right to a jury trial by removing from the jury serious issues regarding reasonableness, conflicts of interest and fiduciary's duties.

ARGUMENT

I.

THIS CASE PROVIDES THE COURT WITH THE UNIQUE OPPORTUNITY TO RESOLVE CONFLICTS REGARDING OFFENSIVE USE OF SUMMARY JUDGMENT AND THE BURDEN OF THE NON-MOVANT

In 1986 this Court decided three cases, Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), which, read together, crystallized this Court's thoughts regarding application of Rule 56 and the proper inquiry on a motion for summary judgment. Those decisions

analyzed in depth the burden placed on the parties supporting and opposing a motion for summary judgment.

However, each of these decisions, discussed summary judgment procedure in the context of a motion made by the party who will not bear the burden of proof at trial. This may be called "defensive" use of summary judgment. There has been no direction from this Court with regard to summary judgment procedure and the applicable burdens in a context similar to this case, where the movant will bear the burden of proof at trial --- "offensive" use.

The labyrinth of summary judgment procedure in this context is exacerbated, not relieved, by the 1986 opinions. For example, in an oft-quoted portion of the Celotex opinion, the majority stated

> In our view, the plain language of Rule 56(c) mandates the

> entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-323 (emphasis added). It is clear that the ambiguity of these opinions, as they relate to a motion by the party who will bear the burden of proof at trial, led the District Court and D.C. Circuit in this case to place upon the Estate unreasonable and unattainable burdens.

The dichotomy between defensive and offensive use of Rule 56 is significant to the non-movant and its rights to a trial by jury. Defensive use of summary

judgment, when successful, denies the non-movant its cause of action and possibility for a judgment; however, offensive summary judgment thrusts a judgment upon a non-movant without requiring the movant to present his evidence to a jury. The difference is significant. While the legislature may limit or bar a claimant's remedy, such as through a statute of limitations, Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988), a defendant's access to a jury when a cause of action is brought against him, maintains the status of a "right" guaranteed by the Seventh Amendment. Appendix C, p. 35.

Offensive summary judgment divests the non-movant of its right to confront and cross-examine the claimant's witnesses; as such, extreme caution should be exercised. This Court must

provide guidance to the lower courts with regard to the application of Rule 56 offensively. Without proper guidance, non-movants may routinely be unjustly denied their 7th Amendment rights and have judgments thrust upon them. The need for guidance is no more evident then in the case at bar where the burdens of the parties and tests of evidence have been so misconstrued as to be in direct conflict with the great weight of authority. While the 1986 trilogy of cases is instructive, the collective analysis from those cases is at best a tenuous fit in the offensive context.

For example, Offensive use of Rule 56 would seem to require the non-movant to prove a negative, a proposition expressly discouraged by the 1986 opinions. The Celotex opinion made it clear that a party must not be required

to produce "affidavits or other similar materials *negating* the opponent's claim," id. 477 U.S. at 323, and yet this is the exact burden placed upon the Estate. The Estate was required to produce affidavits or other similar materials negating the claim of Long and Gregg that Bias had, on unspecified occasions, ingested cocaine. The Court of Appeals even set out the types of evidence it would find acceptable in rebuttal: testimony from "other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits."

Besides violating nearly every tenet of evidentiary consideration in the summary judgment context, the courts placed upon the Estate an impossible

burden. If the occasions to which Long and Gregg testified did not occur, as argued by the Estate, or if Long, Gregg and Bias were the only persons in attendance at any one of those events[5], then in no case could the Estate meet the burden place upon it by the lower courts.

The burden placed upon the Estate is clearly unsupported by the case law of this Court and the District of Columbia Circuit. It is clear that unless this Court intervenes to correct the misapprehensions regarding offensive use of summary judgment, other non-movants will be unjustly denied their rightful access to the jury. The Estate respectfully requests that this Court

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[5] **The fear is a reality in this case as Mr. Gregg, testifying at the Brian Tribble trial, stated that on the January 1986 occasion (the day unspecified) on which Bias supposedly ingested cocaine, only he (Gregg), Long and Bias were present. Appendix D at p. 151.**

step in now to fill the gaps which persist as a result of the Matsushita, Anderson and Celotex cases.

II.

THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION, INVOLVING SUMMARY JUDGMENT PROCEDURE AND THE BURDENS OF THE PARTIES, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Biased, self-interested movants' evidence demonstrates genuine issue of material fact (Question II)

Evidence, offered by and viewed in a light most favorable to the non-movant, tending to demonstrate the bias, self-interest and lack of credibility of movants' sole evidence in support of its motion for summary judgment is sufficient to create a genuine issue of material fact necessitating trial to a jury. This proposition was supported by this Court in Sartor v. Arkansas Natural Gas Corp.,

321 U.S. 620, reh'g denied 322 U.S. 767 (1944). In Sartor, the defendant moved for a summary judgment and attempted to demonstrate the absence of genuine issue of material fact through the affidavits of eight (8) persons. Id. 321 U.S. at 624. Plaintiff, non-movant, in response raised the issue of movants' witnesses' credibility and showed that each witness had an interest in the outcome of that litigation. Id. 321 U.S. at 626. Drawing on the wisdom of historical Supreme Court opinions, Justice Jackson stated: "[t]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Id. 321 U.S. at 628 (quoting Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 408 (1899)); see Aetna L. Ins. Co. v. Ward,

140 U.S. 76 (1891); see also Adickes v. S.H.Kress & Co., 398 U.S. 144, 176 (1970) (Black, J. concurring). Further addressing this issue, the Court observed

> This Court has said: "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar belongs to the jury, who a presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function." [quoting Ward, supra].

Id. at 628. The Court further noted that the importance of confrontation is not

abrogated in the context of summary judgment. "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony." Id.

This Court reaffirmed the importance of cross-examination in addressing self-interested testimony in Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962). In Poller the movant offered the testimony of four (4) interested witnesses; in reversing summary judgment the Court held "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by

jury which so long has been the hallmark of 'even-handed justice.'" Id. U.S. at 473.

According to the District of Columbia Circuit's opinion in this case, however, credibility bears no relevance to the summary judgment analysis. 905 F.2d 1562, Appendix A at p. 16. The Estate did more than raise a mere "supposition" regarding Long and Gregg's lack of credibility; it demonstrated, through specific evidence of bias, self-interest and fabrication, that the credibility of those two witnesses, the only evidence offered in support of the motion for summary judgment, is seriously suspect.

The D.C. Circuit's opinion runs afoul of this Court's admonitions in Sartor which noted that "Rule 56 authorizes judgment only where . . . it

is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor, 321 U.S. at 627.

In addition to Sartor, the opinion of the D.C. Circuit in this case is in direct conflict with other decisions of the D.C. Circuit. In National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1030 (D.C. Cir. 1978), the Court advised "cautious restraint in awarding summary judgment" when movants' sole evidence is the testimony of witness whom are not "totally disinterested."[6] See

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[6] There is also more specific support in this Court and the D.C. Circuit for the proposition that courts should treat with caution testimony given in exchange for immunity from prosecution or leniency. Giglio v. United States, 405 U.S. 150, 154-55 (1972); United States v. Iverson, 637 F.2d 799, 803 (D.C. Cir. 1980). Caution is necessary because a witness seeking immunity or leniency may

also Cellini v. Moss, 232 F.2d 371 (D.C. Cir. 1956); Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950); Garrett Biblical Inst. v. American Univ., 163 F.2d 265 (D.C. Cir. 1947).

The D.C. Circuit's opinion in this case is also in direct conflict with decisions in numerous other Circuits, including the Fifth Circuit, Eighth Circuit and Tenth Circuit. The Fifth Circuit is quite clear that issues of credibility of movants' witness, when properly raised, must defeat summary judgment. In Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77 (5th Cir. 1987). The Court stated unequivocally that "[w]hile the mere

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have an interest in giving a false account or in diverting blame from himself by implicating another. Bruton v. United States, 391 U.S. 123, 136 (1968); United States v. Leonard, 494 F.2d 955, 961 (D.C. Cir. 1974); United States v. Lee, 506 F.2d 111, 119 (D.C. Cir. 1974).

claim that an affidavit is perjured is insufficient, where specific facts are alleged that if proven would call the credibility of the moving party's witnesses into doubt, summary judgment is improper." Id. 831 F.2d at 81 (citations omitted). Further, in Taylor v. Bair, 414 F.2d 815, 818 (5th Cir. 1969), the Fifth Circuit analyzed

> In Benoit v. Wilson, supra, the Texas Supreme Court stated:
>
> "The jury is the exclusive judge of the facts proved, the validity of the witnesses and the weight to be given to the testimony. * * * The jury had the sole right to believe all or any part of the petitioner's testimony. It had the right to say, and reasonably so, that from all the facts and circumstances in this case, we, the jury do not believe * * * your testimony * * *." Id., 239 S.W.2d at 796-797.
>
> In addition, [petitioner] being an interested witness brings into play the rules of permissible skepticism.
>
> "As to the testimony of interested witnesses, the general rule is that, while the jury has no right arbitrarily

> to disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury. ..." Flack v. First Nat. Bank of Dalhart, 1950, 148 Tex. 495, 226 S.W.2d 628 at 633.

The Eighth Circuit is in accord and equally clear on the issue. Lundeen v. Cordner, 356 F.2d 169, 170 (8th Cir. 1966). In National Aviation Underwriters v. Altus Flying Serv., Inc., 555 F.2d 778, 784 (10th Cir. 1977), the Tenth Circuit held that summary judgment is improper if based on the testimony of an interested party regarding facts known only to him which the court found to be "a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." (citing Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955), cert. denied 350 U.S.

883); accord, Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978).[7]

It is undeniable that the D.C. Circuit's opinion in this case stands in direct conflict with this Court's opinion in Sartor, decisions of its own Circuit, and the decisions of numerous other Circuits. It is equally clear that the Estate, through its papers and in argument, revealed specific facts to the District Court and to the D.C. Circuit regarding Long and Gregg's admitted exchange of fabricated testimony for

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[7] Other jurisdictions are in accord. Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570 (7th Cir. 1987); Ondato v. Standard Oil Co., 210 F.2d 233 (2d Cir. 1954)(jury must regard, as evidence, the demeanor and appearance of the affiant, and if reasonable, can reject the testimony accordingly); see also Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972); Transway Fin. Co. v. Gershon, 92 F.R.D. 777 (E.D.N.Y. 1982)(opinion deals only with this issue and resolves that credibility issues regarding movant's witnesses precluded summary judgment).

immunity from prosecution; to ignore this demonstration is to belie the purpose and spirit of summary judgment analysis.

B. Direct versus circumstantial rebuttal evidence (Question I)

In the context of summary judgment, non-movant is not required to produce direct evidence to rebut movants' direct evidence; circumstantial evidence may support inferences which would preclude summary judgment. This proposition is supported by the reasoning and facts of many of this Court's decisions. Anderson, 477 U.S. at 260-261 (1986); Adickes, 398 U.S. at 158 (1970) ("it would be open for the jury ... to infer from the circumstances ..."); Poller, 368 U.S. 464 (1962) (circumstantial evidence raised a genuine issue of material fact in face of direct testimony to the contrary); Theatre Enter. v. Paramount

Distr. Corp., 346 U.S. 537 (1953) (jury may infer agreement from circumstantial evidence); see also Dewey v. Clark, 180 F.2d 766, 773 (D.C. Cir. 1950). The D.C. Circuit, in conflict with this established law, required the Estate to produce direct evidence to rebut the movants' direct evidence. 905 F.2d at 1561-62; Appendix A at pp. 14-16, 19-21. As a consequence, the court improperly ignored the inferences which could reasonably be drawn from the testimony of Bias' parents and coach and the drug test results --- that Len Bias was not a drug user prior to the occasion of his death.[8] The status of movants' evidence

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[8] It must be noted that both the Order of the District Court and the District of Columbia Circuit opinion chastise the Estate for its perceived failure to take the depositions of Terry Long and David Gregg. Appendix A at p. 16; Appendix B at p. 30. Assuming, arguendo, that those individuals could be located for such depositions, it is unclear what the lower courts expect the Estate would have gained by such an exercise.

as "direct" should not affect the inferences which should be drawn from the Estate's circumstantial evidence.

C. Efficiency and results of the drug tests (Questions III and IV)

The trial court, in deciding a motion for summary judgment, may not consider matters not placed before it by the parties to the litigation. Rule 56(c) is clear and complete as to those

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Short of recanted testimony, cross-examination of the deponents regarding the bias and self-interest evident in their testimony would have had no discernible effect on these proceedings. It can be assumed that accusations of fabrication and bias would be denied, and the deposition transcript has no way of recording the demeanor evidence adduced in such an exchange. Further, the Estate should not be denied its litigation strategy decision-making in this regard. As the Second Circuit remarked regarding this issue, the "right to use depositions for discovery does not mean that they are to supplant the right to call and examine the adverse part[ies] . . . before the [trier of fact] ... [W]e cannot very well overestimate the importance of having the witness examined and cross-examined in the presence of the [trier of fact]." Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946).

materials which may be considered by the trial court in considering a motion for summary judgment: pleadings, depositions, answers to interrogatories, admissions on file and affidavits. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) The D.C. Circuit's opinion in the case at bar reveals that it, like the District Court before it, considered information, of unknown origin, with regard to the efficiency of the drug test results. 905 F.2d at 1561-1562; Appendix A at pp. 15-16. The D.C. Circuit, in dismissing the drug test results, found that "these tests speak only to Bias' abstention during the periods preceding the tests." The opinion, inexplicably, fails to cite to any evidence, offered by any party, in support of this determination regarding the efficiency of the drug tests.

Neither of the parties, through affidavits or otherwise, addressed the efficiency of the drug test results or the periods of time for those drug tests could detect traces of cocaine. To the extent the lower courts determined this factual issue without benefit of evidence offered by any party to this litigation, it did so in violation of the precepts of Rule 56 and this Court's opinions interpreting that rule. The efficiency of those drug tests is a genuine issue of material fact on which movant offered no evidence.

With regard to the facts, it must be noted that the testimony of Long and Gregg did not specify the dates of the occasions on which they observed Bias ingesting cocaine. Review of the record shows that Long and Gregg, while supposedly recalling numerous such

occasions, could not specify the day, or month, or season, or even year of any such occasion but one. Therefore, the District Court and D.C. Circuit's conclusions that the drug tests administered and supposed occasions of Bias's drug use do not coincide in time are beyond the boundaries of the facts presented. Further, the court's conclusion that the drug tests are efficient only for an unspecified, but relatively short period of time preceding the test defies common sense and the facts of the efficiency of drug tests.

The D.C. Circuit's dismissal of the drug tests results is clearly a violation of its obligation to draw all reasonable inferences in favor of the Estate. Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 588; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Practically,

the lower courts were required to infer that it was at least possible that the drug tests rebutted the testimony of Long and Gregg and therefore evidenced a genuine issue of material fact precluding summary judgment. By sua sponte evaluation of the efficiency of the drug tests, and upon its own "evidence", the Court violated the province of the jury in determining the weight and credibility of the evidence placed before it. To the extent such is the law of the D.C. Circuit, it is in direct and unacceptable conflict with federal civil procedure and the decisions of this Court, and, therefore, must be reversed.

D. Opinion evidence regarding availability of jumbo life insurance policy. (Question V)

Summary judgment is improper when the only evidence offered by movant,

regarding an issue on which movant will bear the burden of proof at trial, is in the form of opinion evidence of expert witnesses. This proposition was set forth by this Court in Sartor, 321 U.S. 620. The Court in Sartor stated unequivocally that opinion evidence, even when uncontroverted, is not conclusive and the jury is free to disregard it completely. Id. U.S. at 627.

According to the analysis of the D.C. Circuit in this case, however, the testimony of Defendants' experts regarding the availability, in 1986, of a jumbo life insurance policy for Len Bias, is conclusive evidence of the issue permitting summary judgment. It must be noted that the it is essential to movants' claim of non-insurability that they show (it is their burden) the universal unavailability of such a jumbo

policy. In this case, the only evidence offered of this essential element was the testimony of two "experts", Dr. Francis Achampong and Bernard R. Wolfe; a synopsis of their opinions is set forth in the D.C. Circuit's opinion. 905 F.2d at 1562, Appendix A at pp. 17-19. The D.C. Circuit held the testimony of these experts to be unopposed by the Estate and therefore conclusive on the issue of unavailability. Id. As such, the D.C. Circuit's opinion in this case is in clear conflict with this Court's holding in Sartor.

In addition to Sartor, the opinion is in direct conflict with other decisions of the District of Columbia Circuit. In National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978), citing and quoting Sartor, the District of Columbia Circuit

held that summary judgment was inappropriate when an essential element of movants' showing is supported solely by expert opinions. Id. 593 F.2d at 1030 (summary judgment reversed and case remanded for trial).

The court's holding on this issue also contradicts the decisions of numerous other Circuits. e.g. Mims v. United States, 375 F.2d 135, 140 (5th Cir. 1967)(citing Sartor) ("*credibility* and *weight* of expert testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted"). As the decision in this case is in clear and direct conflict with the decisions of this Court, the D.C. Circuit and other Circuits, a Writ of Certiorari should issue, the summary judgment should be reversed and the case remanded for trial.

E. Feasibility of negotiating the reebok contract

The D.C. Circuit addressing the issue of the Reebok negotiations, like those issues related to Bias' alleged drug use, seriously misconstrued the burdens befalling the parties and failed to draw all reasonable inferences in favor of the non-movant, the Estate. As discussed previously, removing these factual issues from the province of the jury, to the extent such action is the law of the D.C. Circuit, is in conflict with the reasoning of the decisions of this Court and other Circuits.

In the case at bar, movant provided some evidence that the negotiations, as conducted on June 18, 1986, could not have produced a final enforceable endorsement contract on that day. Assuming that this evidence meets movants' burden, it is clear that the

Estate offered evidence in rebuttal sufficient to demonstrate a genuine issue of material fact, thereby making summary judgment inappropriate. For example, the Estate offered the testimony of James Bias who stated, under oath, that late in the day of June 18, Fentress represented to them that a contract had been finalized. Further, Reebok's president, Paul Fireman welcomed Len Bias to the "Reebok family." This testimony, that a contract had been finalized, should require the court to draw the reasonable inference that such a contract could have been finalized.

The Estate also offered the testimony of an expert who opined that Fentress breached his fiduciary duties to Bias on June 18th by negotiating with Reebok while maintaining a conflict of interest. The Defendants contend that

this conflict of interest was of no actual consequence, but it is clear that the jury, not the trial court, must be able to determine the facts underlying the negotiations and whether the conflict of interest actually impacted Fentress' ability to secure a contract for Bias.

Finally, the Estate demonstrated the existence of a form Reebok endorsement contract which was presented to Bias at the beginning of the negotiations of June 18th. The jury must also be permitted to weigh this factor on this feasibility issue. The combination of the evidence of Fentress' misrepresentations, his conflict of interest and the role of the form contract clearly demonstrates a genuine issue of material fact as to whether the Defendants breach their fiduciary duties to Bias.

The D.C. Circuit's analysis, resulting in the determination of these issues as a matter of law, is in clear conflict with the decisions of this Court requiring the court to draw all reasonable inferences in favor of the non-movant. Anderson, 477 U.S. at 255. It is clear that this evidence raises more than a metaphysical doubt as to the "infeasibility" of securing an endorsement contract on June 18, 1986. Matsushita, 475 U.S. at 586. To the extent the D.C. Circuit permits the trial courts of its circuit to decide these issues, the law of the Circuit is undeniably in conflict with the reasoning of the decisions of this Court, the other Circuits and the general precepts of summary judgment law. As such, the Writ of Certiorari should issue, the opinion

of the D.C. Circuit must be reversed and this case remanded for trial to a jury.

CONCLUSION

As this Court warned in Sartor, summary judgment is inappropriate unless it is "quite clear what the truth is." Sartor, 321 U.S. at 627. To use Rule 56 otherwise is to "cut litigants off from their right of trial by jury [when] they really have issues to try." Id. The facts and complex issues of this case make it undeniable that it is not "quite clear what the truth is." It is clear that the D.C. Circuit in this case, has improperly denied the Estate its right to trial by jury when it really,a nd rightfully, has issues to try. In that regard, the Writ of Certiorari should issue and the opinion should be reversed and the case remanded for trial.

To the extent the D.C. Circuit's misinterpretations of summary judgment procedure is a consequence of this Court's 1986 opinions, this Court should issue a Writ of Certiorari and settle the ambiguities of those opinions as they relate to an offensive use of Rule 56.

THEREFORE, for all of the reasons set forth above, Petitioner prays that this Court grant its petition and issue of Writ of Certiorari.

respectfully submitted,

James R. Eyler*
Charles R. Diffenderffer
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(301) 727-6464

Wayne K. Curry
MYERS, BILLINGSLEY, SHIPLEY,
CURRY, RODBELL &
ROSENBAUM, P.A.
Suite 400
6801 Kenilworth Avenue
Riverdale, Maryland 20737-1385
(301) 779-5746

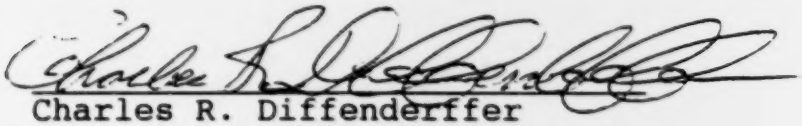
*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 13th day of September, 1990, I caused to be hand-delivered the required number of the foregoing Petition for Writ of Certiorari and Appendix to:

Patrick W. Lee, Esquire
Luther Zeigler, Esquire
CROMWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Counsel for Respondents, Advantage International, Inc. and A. Lee Fentress



Charles R. Diffenderffer

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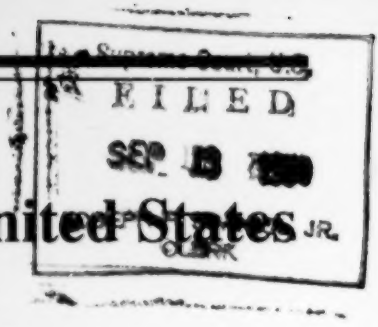

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD KEVIN BIAS, DECEASED,

Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. AND A. LEE FENTRESS

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JAMES R. EYLER*
CHARLES R. DIFFENDERFFER
MILES & STOCKBRIDGE
10 Light Street
Baltimore, Maryland 21202
(301) 727-6464

WAYNE K. CURRY
MYERS, BILLINGSLEY, SHIPLEY, CURRY, RODBELL & ROSENBAUM, P.A.
Suite 400
6801 Kenilworth Avenue
Riverdale, Maryland 20737-1385
(301) 699-5800

*Counsel of Record

Attorneys for Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 1990

Decided June 15, 1990

No. 89-7116

JAMES BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD KEVIN BIAS, DECEASED,

APPELLANT

v.

ADVANTAGE INTERNATIONAL, INC. AND A. LEE FENTRESS,

APPELLEES

No. 89-7117

ADVANTAGE INTERNATIONAL, INC.,

CROSS-APPELLANT

v.

JAMES BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD KEVIN BIAS, DECEASED,

CROSS-APPELLEE

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 87-01951)

James E. Eyler, with whom Mauricio E. Barreiro was on the brief, for appellant in No. 89-7116 and cross-appellee in No. 89-7117.

Patrick W. Lee, with whom John A. Macleod and Luther Zeigler were on the brief, for appellees in No. 89-7116 and cross-appellant in No. 89-7117.

Before SILBERMAN, WILLIAMS, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge: This case arises out of the tragic death from cocaine intoxication of University of Maryland basketball star Leonard K. Bias ("Bias"). James Bias, as Personal Representative of the Estate of Leonard K. Bias, deceased ("the Estate"), appeals an order of the District Court for District of Columbia which granted summary judgment to defendants Advantage International, Inc. ("Advantage") and A. Lee Fentress on the Estate's claims arising out of a representation agreement between Bias and Advantage. Advantage and Fentress (collectively "the defendants") cross-appeal the District Court's grant of summary judgment to the Estate on the defendants' counterclaims, but the defendants represent that they will not press their appeal of the District Court's order with respect to the counterclaims if

this Court affirms the District Court's summary judgment to the defendants with respect to the Estate's claims. For the reasons which follow, we affirm the order of the District Court granting to the defendants summary judgment with respect to the Estate's claims and we do not address the District Court's order with respect to the defendants' counterclaims.

I. BACKGROUND

On April 7, 1986, after the close of his college basketball career, Bias entered into a representation agreement with Advantage whereby Advantage agreed to advise and represent Bias in his affairs. Fentress was the particular Advantage representative servicing the Bias account. On June 17 of that year Bias was picked by the Boston Celtics in the first round of the National Basketball Association draft. On the morning of June 19, 1986, Bias died

of cocaine intoxication. The Estate sued Advantage and Fentress for two separate injuries allegedly arising out of the representation arrangement between Bias and the defendants.[1]

First, the Estate alleges that, prior to Bias's death, Bias and his parents directed Fentress to obtain a one-million dollar life insurance policy on Bias's life that Fentress represented to Bias and Bias's parents that he had secured such a policy, and that in reliance on Fentress's assurances, Bias's parents did not independently seek to buy an insurance policy on Bias's life. Although the defendants did obtain increased disability coverage for Bias, in a one-million dollar

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[1] The Estate also sued Fidelity Security Life Insurance Company and Reebok International, Ltd. The District Court awarded summary judgment to Fidelity and Reebok and the Estate does not appeal the District Court's orders with respect to those two defendants.

disability insurance policy with an accidental death rider, they did not secure any life insurance coverage for Bias prior to his death.

Second, on June 18, 1986, the day after he was drafted by the Boston Celtics, Bias, through and with Fentress, entered into negotiations with Reebok International, Ltd. ("Reebok") concerning a potential endorsement contract. The Estate alleges that after several hours of negotiations Fentress requested that Bias and his father leave so that Fentress could continue negotiating with Reebok representatives in private. The Estate alleges that Fentress then began negotiating a proposed package deal with Reebok on behalf of not just Bias, but also other players represented by Advantage. The estate contends that Fentress breached a duty to Bias by

negotiating on behalf of other players, and that because Fentress opened up these broader negotiations he was unable to complete the negotiations for Bias on June 18. The Estate claims that as a result of Fentress's actions, on June 19, when Bias died, Bias had no contract with Reebok. The Estate alleges that the contract that Bias would have obtained would have provided for an unconditional lump sum payment which Bias would have received up front.

The District Court awarded the defendants summary judgment on both of these claims.[2]

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[2] The District Court also concluded that, in any event, Fentress could not be held individually liable because all of his activities on behalf of Bias were performed in his official capacity as an officer or agent of Advantage. We need not address this aspect of the District Court's order because we affirm the District Court's award of summary judgment to both defendants for the reasons discussed in this opinion.

With respect to the first claim, the District Court held, in effect, that the Estate did not suffer any damage from the defendants' alleged failure to obtain life insurance for Bias because, even if the defendants had tried to obtain a one-million dollar policy on Bias's life, they would not have been able to do so. The District Court based this conclusion on the facts, about which it found no genuine issue, that Bias was a cocaine user and that no insurer in 1986 would have issued a one-million dollar life insurance policy, or "jumbo" policy, to a cocaine user unless the participant made a misrepresentation regarding the applicant's use of drugs, thereby rendering the insurance policy void.

With respect to the Estate's second claim, the District Court concluded that the defendants could not be held liable

for failing to produce a finished endorsement contract with Reebok before Bias's death because the defendants had no independent reason to expedite the signing of the endorsement contract to the extent argued by the Estate, and because the defendants could not have obtained a signed contract before Bias's death even if they had tried to do so.

The Estate appeals both of the District Court's conclusions, arguing that there is a genuine issue as to Bias's insurability and regarding the defendants' failure to sign a Reebok contract on Bias's behalf prior to Bias's death.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment where

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law. The Supreme Court has stated that the moving party always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Supreme Court also explained that summary judgment is appropriate, no matter which party is the moving party, where a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. Thus, the moving party must explain its reasons for concluding that the record does not reveal any genuine issues of material fact, and must make a showing

supporting its claims insofar as those claims involve issues on which it will bear the burden at trial.

Once the moving party has carried its burden, the responsibility then shifts to the nonmoving party to show that there is, in fact, a genuine issue of material fact. The Supreme Court has directed that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986)(citations omitted). The nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (citations omitted) (emphasis in original). In evaluating the nonmovant's proffer, a court must of course draw from the evidence all justifiable inferences in favor of the nonmovant. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

III. THE INSURANCE ISSUE

The District Court's determination that there was no genuine issue involving Bias's insurability rests on two subsidiary conclusions: First, the District Court concluded that there was no genuine issue as to the fact that Bias was a drug user. Second, the District Court held that there was no dispute about the fact that as a drug user, Bias could not have obtained a jumbo life insurance policy. We can only affirm the District Court's award of summary judgment to the defendants on the insurance issue if both of these conclusions were correct.

A. Bias's Prior Drug Use

The defendants in this case offered the eyewitness testimony of two former teammates of Bias, Terry Long and David

Gregg, in order to show that Bias was a cocaine user during the period prior to his death. Long and Gregg both described numerous occasions when they saw Bias ingest cocaine, and Long testified that he was introduced to cocaine by Bias and that Bias sometimes supplied others with cocaine.

Although on appeal the Estate attempts to discredit the testimony of Long and Gregg, the Estate did not seek to impeach the testimony of these witnesses before the District Court, and the Estate made no effort to depose these witnesses. Instead, the Estate offered affidavits from each of Bias's parents stating that Bias was not a drug user; the deposition testimony of Bias's basketball coach, Charles "Lefty" Driesell, who testified that he knew Bias well for four years and never knew Bias to be a user of drugs at any time prior to

his death; and the results of several drug tests administered to Bias during the four years prior to his death which may have shown that, on the occasions when the tests were administered, there were no traces in Bias's system of the drugs for which he was tested.

Because the Estate's generalized evidence that Bias was not a drug user did not contradict the more specific testimony of teammates who knew Bias well and had seen him use cocaine on particular occasions, the District Court determined that there was no genuine issue as to the fact that Bias was a drug user. We agree.

There is no question that the defendants satisfied their initial burden on the issue of Bias's drug use. The testimony of Long and Gregg clearly tends to show that Bias was a cocaine user. We also agree with the District Court that the Estate

did not rebut the defendants' showing. The testimony of Bias's parents to the effect that they knew Bias well and did not know him to be a drug user does not rebut the Long and Gregg testimony about Bias's drug use on particular occasions. The District Court properly held that rebuttal testimony either must come from persons familiar with the particular events to which the defendants' witnesses testified or must otherwise cast more than metaphysical doubt on the credibility of that testimony. Bias's parents and coach did not have personal knowledge of Bias's activities at the sorts of parties and gatherings about which Long and Gregg testified. The drug test results offered by the Estate may show that Bias had no cocaine in his system on the dates when the tests were administered, but, as the

District Court correctly noted, these tests speak only to Bias's abstention during the periods preceding the tests. The tests do not rebut the Long and Gregg testimony that on a number of occasions Bias ingested cocaine in their presence.

The Estate could have deposed Long and Gregg, or otherwise attempted to impeach their testimony. The Estate also could have offered the testimony of other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits. The Estate did none of these things. The Estate is not entitled to reach the jury merely on the supposition that the jury might not believe defendants' witnesses. We thus agree with the District Court that there was no genuine issue of fact

concerning Bias's status as a cocaine user.

B. The Availability of a Jumbo Policy in Light of Bias's Prior Drug Use

The defendants submitted affidavits from several experts who testified that in their expert opinions no insurer in 1986 would have issued a jumbo policy without inquiring, at some point in the application process, about the applicant's prior drug use. Dr. Francis Achampong, an Associate Professor of Business Law and Insurance and an occasional consultant for the insurance industry, asserted that life insurance companies will always and as a routine matter ask an applicant whether the applicant has ever used cocaine before issuing a term life policy of this size to that applicant. Joint Appendix ("J.A.") 61. Dr. Achampong testified that insurers inquire about prior drug use at some stage

of the application process, generally either in the initial application, during the medical examination, during the follow-up character investigation, or at some other stage. J.A. 466. Dr. Achampong further concluded that an affirmative answer to this question renders an applicant uninsurable because, "[a]s a matter of standard underwriting procedure, insurance companies do not issue term life insurance policies, let alone $1 million term policies, to applicants they know have recently used cocaine." J.A. 61. Bernard R. Wolfe, a licensed insurance agent experienced in evaluating the insurance needs of professional athletes, offered essentially the same opinion that insurance companies do not issue substantial term life insurance policies without first investigating an applicant's

prior drug use and that insurance companies do not issue substantial term life insurance policies to applicants who use cocaine. J.A. 79.

The Estate responded with expert testimony of its own showing that in 1986 some companies did not inquire about an applicant's prior drug use at the application stage and that other companies at the time did not inquire about an applicant's prior drug use at the medical examination stage of the application process. The Estate did not offer any testimony showing that a company existed at that time which would not have inquired about an applicant's prior drug use at *some* stage in the process. Moreover, the Estate did not offer any testimony tending to show that even if an applicant did admit to being a cocaine user, a company existed in 1986 which would have issued a

jumbo policy to that applicant. The District Court thus concluded that the Estate had failed to rebut the defendants' showing that as a cocaine user Bias would have been unable to obtain a jumbo policy. The District Court recognized that Bias might have been able to obtain a policy by lying about his prior drug use, but rightly concluded that such a knowing and material misrepresentation in response to a direct question would have rendered void any policy which Bias thereby obtained. See D.C. Code Ann. §35-414 (1988).

We agree with the District Court. The defendants offered evidence that *every* insurance company inquires about the prior drug use of an applicant for a jumbo policy at *some point* in the application process. The Estate's evidence that some

insurance companies existed in 1986 which did not inquire about prior drug use at certain particular stages in the application process does not undermine the defendant's claim that at *some* point in the process *every* insurance company did inquire about drug use, particularly where a jumbo policy was involved. The Estate failed to name a single particular company or provide other evidence that a single company existed which would have issued a jumbo policy in 1986 without inquiring about the applicant's drug use. Because the Estate has failed to do more than show that there is "some metaphysical doubt as to the material facts," Matsushita Elec., 475 U.S. at 586, the District Court properly concluded that there was no genuine issue of material fact as to the insurability of a drug user.

IV. THE REEBOK CONTRACT

We find no merit in the Estate's claim based on the Reebok contract negotiations. Neither the language of the representation agreement between Bias and Advantage nor any other evidence could support a finding that the defendants breached any duty to Bias by failing to push to obtain a signed contract on June 18, 1986.

Even if the defendants were under some duty to try to sign a contract for Bias as quickly as possible, the Estate has offered no evidence to rebut the defendants' showing that the contract could not possibly have been signed prior to Bias's death, irrespective of the defendants' actions. The defendants offered testimony form Reebok officials that the language of any agreement between Reebok and Bias would have had to be reviewed by the Reebok legal department before Reebok would have signed the

agreement. J.A. 144. The Estate did not counter the defendants' evidence that an endorsement contract cannot be negotiated, drafted, and signed in a single day. In fact, the Estate's own expert testified that a contract between Bias and Reebok could not feasibly have been signed on June 18, 1986. J.A. 125. The Estate must do more than merely argue that the feasibility of obtaining a signed endorsement contract in a single day is a question for the jury; it must offer some basis for its claim that a jury could reasonably conclude that the contract could have been drafted and signed on June 18. Because the Estate failed to do this, we affirm the District Court's award of summary judgment to the defendants on this claim.

V. CONCLUSION

In order to withstand a summary judgment motion once the moving party has made a prima facie showing to support its claims, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The Estate has failed to come forward with such facts in this case, relying instead on bare arguments and allegations or on evidence which does not actually create a genuine issue for trial. For this reason, we affirm the District Court's award of summary judgment to the defendants in this case.[3]

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[3] The defendants represent that they will not press their appeal of the District Court's award of summary judgment to the Estate on the defendants' counterclaims if this Court affirms the District Court's summary judgment to the defendants on the Estate's claims. Because we do affirm the District Court's order with respect to the Estate's claims, we need not address the District Court's order with respect to the defendants' counterclaims.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES BIAS, as Personal representative of the Estate of LEONARD KEVIN BIAS, Deceased,

Plaintiff,

Civil Action Nos. 87-1951 87-1995

v.

ADVANTAGE INTERNATIONAL, INC. et al.,

Defendants.

_____/

ORDER

The two remaining defendants in this case, Advantage International and A. Lee Fentress, have filed motions to dismiss or for summary judgment. The first issue before the Court is whether any life insurance carrier would have issued a $1 million term life policy to Len Bias in 1986 without asking, at some point in the

application process, whether he had used or was using illegal drugs. The plaintiff's claims against Advantage depends on the existence of such a policy; without that possibility, there can be no liability on the part of Advantage or Mr. Fentress for failure to obtain something unobtainable.

The Court concludes that there is no genuine issue of material fact as to insurability. In the context of a summary judgment motion, the burden of proving a negative, i.e., the absence of a policy which would have insured Len Bias for $1 million dollars without at some point asking about drug use, is initially on the defendant, who must produce evidence to that effect. The burden then shifts to the plaintiff to rebut this evidence, either substantively on the merits, or in such a way as to raise genuine issues of material

fact requiring trial. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.... One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1985).

The original burden was on Advantage to show that Len Bias was uninsurable; the plaintiff had the burden of rebuttal in summary judgment. The Court finds that the plaintiff has failed to rebut this showing, and therefore will grant summary judgment to Advantage on this issue. The plaintiff's expert testimony is not adequately grounded in the facts of this

case: the affidavits are hypothetical and do not offer an expert conclusion as to Bias' insurability.

Even making allowances for the flaws in the plaintiff's affidavits, the Court finds that they fail to negate the defendant's showing that Len Bias was uninsurable for $1 million dollars in 1986. The defendant argues correctly that the plaintiff's' witnesses seek to divide up the process of obtaining large insurance policies into arbitrary chunks. Even if some insurers did not ask questions about drug use at one or another point the application process, plaintiff has failed to show that any insurer in 1986 would have issued a "jumbo" life insurance policy without making such an inquiry at some point in the process. The question is not whether Len Bias could have gotten through some portion of the

application process at one or another insurance company: the question is whether he was insurable, and that requires the plaintiff to rebut Advantage's showing that he could not have gotten through the entire application process at any company without being asked about drug use. the plaintiff's affidavits fail, therefore, to create a factual issue as to Bias' insurability.

Plaintiff argues that the issue of whether or not Len Bias used cocaine or other drugs is irrelevant in that there were insurance policies available to him which would have covered him without making an inquiry into drug abuse. Since the Court finds that plaintiff has failed to rebut defendant's showing on the issue of insurability, the question of Bias' cocaine use must be broached. If Bias used cocaine, he could have been insured only

upon a misrepresentation; if he did not, then plaintiff would have a claim against Advantage, Fentress or both for failure to obtain a policy. Plaintiff, however, has failed to rebut the defendant's showing that Bias did use cocaine and was, therefore, uninsurable unless willing to make a misrepresentation, which would have rendered void any policy then obtained. The testimony of plaintiff and others that they never knew Bias to use cocaine does not rebut eyewitness testimony that he did so on several occasions. Rebuttal testimony must come from persons familiar with the particular events to which defendant's witnesses testified. Plaintiff has also failed to seek to impeach the defendant's witnesses, and has made no effort to depose them. Similarly, plaintiff's reliance on negative drug tests undergone by Bias is inconclusive;

such evidence speaks only to abstention on those particular occasions.

Therefore, the Court finds that plaintiff has failed to rebut defendant's showing that Len Bias was uninsurable, and has failed to raise any genuine issue of material fact as to either aspect of the insurability issue, i.e., drug use, or the availability of a "jumbo" insurance policy for a drug user.

Plaintiff has claimed that Advantage failed to complete negotiations for an endorsement agreement between Len Bias and Reebok. Had an agreement been signed, plaintiff claims Bias would have been "guaranteed" compensation of approximately $162,500. Defendants contend that it was not feasible for Advantage to have obtained a written agreement at the conclusion of the negotiating session, since Reebok would not have entered into

an agreement until it had prepared a written contract and had it reviewed by its legal staff. Plaintiff's argument that defendants might have obtained a signed contract had they not had a conflict of interest is not persuasive since Bias did not have an exclusive representation contract with Advantage, and because defendant had no independent reason to expedite signing an endorsement agreement with Reebok. Therefore, the Court finds that plaintiff has failed to rebut Advantage's showing that it is not liable for failure to produce a finished endorsement contract before Bias' death.

On the claim against Defendant Fentress as an individual, the Court finds that he did not have an individual contractual or fiduciary relationship with Len Bias, nor was there a contractual or fiduciary relationship between Fentress

and Bias' parents. The records shows that Fentress acted in his capacity as an officer of Advantage, but the Representation Agreement between Bias and Advantage makes it clear that all obligations were undertaken by Advantage, not by Fentress personally, just as all benefits under the contract were to accrue to Advantage. All of Fentress' activities on behalf of Bias were performed in his official capacity as an officer or agent of Advantage. In the absence of an agreement stating otherwise, a person making a contract with another as agent for a disclosed principal does not become a party to the contract. Rittenberg v. Donohoe Construction Co., 426 A.2d. 338 (D.C. App. 1981). The Court finds that Fentress acted solely in his official capacity, and is, therefore, not liable.

Therefore, the defendants' motion for summary judgment is GRANTED. There is one remaining claim in this case, which is Advantage's counterclaim, and the Court invites a dispositive motion form the counterdefendant.

[11/8/88]
Date

GEORGE H. REVERCOMB
DISTRICT JUDGE

Mauricio E. Barreiro
Miles & Stockbridge
10 Light Street
Baltimore, Maryland 21202

Patrick W. Lee
John A. Macleod
Luther Zeigler
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20002

Pamela R. Lester
Advantage International, Inc.
Suite 450E
1025 Thomas Jefferson St., N.W.
Washington, D.C. 20007

APPENDIX C

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim

is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone

although there is a genuine issue as to the amount of damages.

(d) Case not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemental or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials

of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court

at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX D

CROSS EXAMINATION

BY MR. MORROW:

Q Now, Mr. Long, if you don't understand any of my questions, please just indicate and I'll be happy to try to make you understand, all right?

A Okay.

Q You indicated that you knew Mr. Tribble as a friend of Lenny's; is that correct?

A Yes.

Q Was he a friend of yours?

A Yes.

Q He was.

And you knew him at the University of Maryland as a student; is that correct?

A Yes.

Q How long was he a student there, do you know?

A I'm not exactly sure.

Q And the bulk of your contacts with Mr. Tribble were at the school?

A Yes.

Q And you were only at his apartment one time; is that correct?

A Yes.

Q Now, would you ever go out with Mr. Tribble and Mr. Bias to clubs?

A No, sir.

Q You did not.

Did you ever socialize with him other than just hanging around the dorms?

A No, sir.

Q Did you play basketball with him?

A Oh, yes, sir.

Q In fact, you played basketball quite a lot?

A Yes, sir.

Q And that was --

THE COURT: These would be pickup games on the outdoor lots and all in one of the gyms on campus?

THE WITNESS: Yes, sir.

THE COURT: All right. Go on, Mr. Morrow.

MR. MORROW: Thank you, Your Honor.

BY MR. MORROW:

Q Now, on the particular evening of June 18th, 1986, you indicated that Mr. Bias came in around 10:00 o'clock?

A Yes, sir.

Q And you indicted further that he was excited?

A Yes, sir.

Q And everyone else was excited for him?

A Yes, sir.

Q And he indicated to you that on this particular special evening that he wanted to celebrate?

A Yes, sir.

Q Was Lenny the type of person who celebrated frequently?

A No, not really.

Q This was a particularly unusual occasion; wasn't it?

A No, I don't think so.

Q Do you understand my question? This was a particularly unusual occasion to celebrate because of what had happened to him in the previous few days?

A I don't think it would be unusual. I think it would be quite normal. Maybe I'm misunderstanding your question.

Q Yes. It would be quite normal for somebody who had been through what he

went through to have wanted to celebrate; is that correct?

A Yes, sir.

Q All right. I think we're talking the same thing, but just saying it differently.

And this was for Lenny -- for Lenny, this was quite unusual, this event in his life and the level of his excitement?

A Yes, sir.

Q Okay. That's what I was trying to get at. I'm sorry.

He spent a few minutes with Madelyne Woods; is that right?

A Excuse me?

Q Lenny spent a few minutes with Madelyn Woods after he came in?

A Yes, sir.

Q And then he went back?

A Yes, sir.

Q And he left the apartment and you don't know where he went?

A Yes, sir.

Q And he came back about you said between 2:00 or you woke up between 2:00 and 2:30; is that correct?

A Somewhere in there, yes, sir.

Q How do you know that's what time it was?

A Because I looked at my alarm clock.

Q You looked at your clock?

A Yes.

Q And what time was it, 2:00 or 2:30?

A Somewhere around there. I'm not exactly sure. I know it was after 2:00.

Q All right.

Somewhere in that vicinity?

A Yes, sir.

Q And you were awakened because Lenny woke you up; is that right?

A Yes, sir.

Q Now, you indicated that he knocked on the door?

A Yes, sir.

Q And when you came to the door, he had a beer in his hand and a bag in his hand?

A Yes, sir.

Q And you indicated that at some point, he walked in the Room 1103.

A Yes, sir.

Q Okay.

But you didn't see what he did in 1103; did you?

A No, sir.

Q Okay.

And although Mr. Bonsib said that you saw him walk to the refrigerator,

you didn't really see where he was walking in 1103; did you?

A No, sir.

Q And you didn't see what was inside the bag; is that correct?

A No, sir.

Q Now, you went with Mr. Gregg to the refrigerator to get a beer; right?

A Yes, sir.

Q And then you came back and the cocaine that you have described was already on the table when you came in?

A Yes, sir.

Q And, so, you have candidly admitted to the ladies and gentlemen of the jury that you don't know where that cocaine came from; do you?

A No, sir.

Q You don't know if that's what Lenny had in the bag; do you?

A No, sir.

Q You don't know if Lenny brought it in the room; do you?

A No, sir.

Q Now, when you saw the cocaine there, you didn't look at it and say, oh, my gosh, what is this; you weren't shocked; were you?

A No, sir.

Q You have seen cocaine before; hadn't you?

A Yes, sir.

Q In fact, you testified to the ladies and gentlemen of the jury that you had used cocaine, I believe you said as many as ten times?

A Yes, sir.

Q Now, you also testified that on many of these occasions that Mr. Bias had supplied you with this cocaine; is that correct?

A Yes, sir.

Q How many times of the ten times or so that you have used it did he supply you with it?

A I'm not exactly sure.

Q Okay.

More than five?

A I'm not exactly sure.

Q Well, where did you get the --

A Somewhere around five.

Q Somewhere around five?

A Five or six. Like I say, I'm not exactly sure.

Q On the other occasions, you just got it from other people that you knew?

A Yes, sir.

Q And they knew that you were a cocaine user; is that correct?

A Yes, sir.

Q And, so, they would know to come up to you to offer you cocaine from time to time?

A Yes, sir.

Q Other players would give it to you?

A No, sir.

Q Now, you also mentioned that you had seen -- you had been in the company of Mr. Bias and Mr. Tribble when cocaine was done?

A Yes, sir.

Q I just wanted to clarify the record. Mr. Tribble wasn't with you on all those ten times you did cocaine; was he?

A No, sir.

Q And how many times was he with you when you did cocaine?

A Twice.

Q Twice. Once on June 19th and the other occasion, according to your testimony, back in January?

A Yes, sir.

Q So, on all these occasions that you did cocaine and all these occasions that you were with Len Bias when you received the cocaine from him, this man wasn't there; was he?

A Except for twice, yes, sir.

Q Except for the two times.

Now, you said Brian said something about they got it from the bottom of the stash. You don't know who "they" was?

A No, sir.

Q It could have been some other people?

A Yes, sir.

Q Could have been the people who brought it into the room?

A Yes, sir.

Q It could have been anybody?

A Yes, sir.

Q Now, did he just come out and say that, or was this kind of an afterthought? I mean, what was the context of that?

A Someone had asked where it came from.

Q Who asked?

A David Gregg asked.

Q Who did he ask?

A He didn't say. He was directing it towards Lenny and Brian.

Q Now, you indicated that at some point in the evening that Mr. Nevin came by?

A Yes, sir.

Q But you didn't let him in?

A No, sir.

Q Now, just in case any of the ladies and gentlemen of the jury are wondering, as I am, how did you know it was Mr. Nevin if you didn't let him in?

A Because he came to the door and said something.

Q Oh, he said something outside the door?

A Yes, sir.

Q And why didn't you let him in?

A Because he don't hand out with us.

Q Because he doesn't hang out with you?

A No, sir.

Q And then did you say anything to him?

A I can't recall. I think we may have told him to go to bed or something.

Q But you indicated to him that you're in the room. You didn't all be quiet so he didn't know you were there; did you?

A No. He knew we were in there.

Q Was that usual, that you just would ignore somebody and not let them in?

A Yes, sir.

Q Now, Mr. Bonsib pointed out that you had a canister of McDonald's straws.

A Yes, sir.

Q Did you keep those for the occasions when you snorted cocaine in your room?

A No, sir.

Q You did not?

A No, sir.

Q What were they there for?

A My girlfriend loves drinking sodas out of straws and I just happened to take a lot of them at McDonald's one night. It was no big thing.

Q Now, who prepared the straws? You indicated to the ladies and gentlemen of the jury that they were cut in some fashion?

A Yes, sir.

Q Who did that?

A I can't exactly recall.

THE COURT: Do you remember what kind of an instrument was used to cut them?

THE WITNESS: I have a pair of scissors that should be in that Exhibit. They may have been used or cut by the scissors. I can't exactly remember.

THE COURT: Would they have been the same scissors that were used on Mr. Bias to keep his mouth open?

THE WITNESS: Yes, sir.

THE COURT: Where they pointed scissors or the kind you would just cut paper with or with the little round edges?

THE WITNESS: No, They were the pointed kind?

THE COURT: The pointed kind like a lady would use to sew with?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. MORROW:

Q Now, if I understand your testimony correctly, you, or was it Mr. Tribble you say put the cocaine in the drawer when Mr. Baxter knocked on the door:

A Yes, sir, I believe so.

Q And somebody told him to put it in the drawer; didn't they?

A Yes, sir.

Q Who was that?

A I may have mentioned it. I can't remember.

Q Okay.

You told him to put it in the drawer?

A Yes, sir.

Q And Mr. Baxter stayed around for a period of time and you had some beers and he left and then you told him to take it out of the drawer; didn't you?

A No, sir.

Q No?

How did it come out of the drawer?

A It just -- I don't know who mentioned it, but we just pulled it out. I don't remember mentioning it, you know, take it out of the drawer.

THE COURT: You indicated that when you used the cocaine that night that you got kind of high or intoxicated yourself; is that right?

THE WITNESS: Yes, sir.

THE COURT: When Mr. Baxter came in the room, what was your state at that time?

THE WITNESS: I was under complete control of myself.

THE COURT: You were under control of yourself at that time?

THE WITNESS: Yes, sir.

THE COURT: Go on, Mr. Morrow.

MR. MORROW: Thank you, Your Honor.

BY MR. MORROW:

Q Now, you indicated that in the ten or so times you used cocaine that only about five of those times you got it from Lenny Bias?

A Yes, sir.

Q Okay.

Now, let me ask you just a question here, Mr. Gregg. Do you recall that you were in --

A Mr. Long.

Q Mr. Long, I'm sorry. That you were in the Grand Jury back in October 16th, 1986?

A Yes, sir.

Q And you were in there with Mr. Marshall?

A Yes, sir.

Q And then you and Mr. Marshall and then the persons of the Grand Jury; right?

A Yes. Right.

Q Your attorney was not in there with you; was he? He was outside of the Grand Jury?

A Yes, sir.

Q Now, let me show you a portion of your Grand Jury testimony and see if I can't refresh your recollection a little bit.

MR. BONSIB: Mr. Morrow, would you like to have the original transcript marked to be used?

MR. MORROW: No. I'm not going to put it into evidence.

MR. BONSIB: I didn't mean it for that reason.

THE COURT: Is the numbering on yours and the regular record the same so Mr. Bonsib can follow what pages you're on?

MR. MORROW: I would hope so, Your Honor, but I hesitate to say.

THE COURT: What page are you looking at?

MR. MORROW: Page 20, line 15.

Why don't you start looking at this?

(Thereupon, the witness viewing same.)

BY MR. MORROW:

Q Okay.

Have you read it?

A Yes, sir.

Q Now, in the Grand Jury, just to refresh my recollection, you were under oath when you were in the Grand Jury; weren't you?

A Yes, sir.

Q Just like you are under oath now?

A Yes, sir.

Q And do you recall, sir, that Mr. Marshall asked you where did the cocaine come from, that is, referring to the occasions that you had used it?

A Repeat the question.

Q Mr. Marshall asked you the question where did the cocaine come from, meaning the cocaine that you used on the prior occasions.

A Yes.

Q And you recall your answer was, "Except for the night with Brian up in his apartment, the night in our apartment, I had gotten it from Leonard, because he would come in and say he knew I smoked marijuana, we smoked marijuana together. He would come in, knock on my door and tell me to come to his room and he would flip out a dollar bill which he had cocaine in it and I asked him where he got it and he said, 'Don't ask no questions.'"

Now, do you recall that, in effect, you said except for those two occasions, you had always gotten it from Leonard, meaning Leonard Bias?

A Most of time, yes.

Q Okay.

And which occasion were you correct, today in your testimony before the ladies and gentlemen of the jury or in the Grand Jury back in October.

A I misunderstood. What are you trying to get at? I don't understand your question.

Q Well, today I thought you said to the ladies and gentlemen of the Grand Jury that only some of the time --

THE COURT: The ladies and gentlemen of this jury.

BY MR. MORROW:

Q I'm sorry, the ladies and gentlemen of the jury, that you had gotten the cocaine only on maybe five occasions from Mr. Bias; yet, I understand your testimony back in October, you said except for the two occasions, the one at Brian's apartment and the one on June 19th, you always got it from Mr. Bias.

Which is correct?

A No, I didn't always get it from Mr. Bias.

Q Okay.

So, your testimony before the Grand Jury was incorrect?

A No. What did I say in the Grand Jury?

(Thereupon, the witness viewing document.)

A Line 15.

Q It says, "Except for the night with Brian up in his apartment and the" --

A This is right. This is correct.

Q -- "I had gotten it from Leonard."

A This is correct.

Q Okay.

So, this is correct?

A That is correct.

Q And your testimony here today was incorrect; is that right?

A I'm not sure if that's the way I said it.

Q Okay.

Now, you said you didn't recall who used the coke first; is that right?

A No, sir.

Q Okay.

The coke, I think you indicated you started out and people would go up to the tray just on their own individually?

A Yes, sir.

Q And that's the tray that was sitting on the desk there?

A The mirror, yes.

Q And then as a matter of convenience, you just settled in and started passing it around?

A Yes, sir.

Q And you passed it to maybe Mr. Tribble on some occasions; is that right?

A Yes, sir.

Q And maybe you passed it to Mr. Bias on some occasions; is that right?

A Yes, sir.

Q And maybe you passed it to Mr. Gregg on some occasions?

A Yes,sir.

Q You didn't get charged with distribution of cocaine; did you?

A No, sir.

Q Uh huh.

The only person that was charged with that was Brian; huh?

A Yes, sir.

Q I see.

Now, do you know what time approximately that Mr. Baxter left the room?

A Not exactly. 3:30, 3:15.

THE COURT: At the time Mr. Baxter left the room, was any of the other four people in the room intoxicated?

THE WITNESS: Not to my recollection.

THE COURT: And there were four people in the room?

THE WITNESS: Yes, sir.

THE COURT: All right. Go on, Mr. Morrow.

BY MR. MORROW:

Q Now, did you know how much beer that was in your refrigerator?

A No, sir.

Q Okay.

Was there more than the two six packs that Lenny and Brian had brought?

A Not that I know of. I didn't know until I went out and looked.

Q Okay.

What did you see when you went out and looked?

A Two six packs of Private Stock Malt Liquor.

Q Okay.

You didn't have any beer in there before that?

A No, sir, not that I know of.

Q Just out of curiosity, on these many occasions when you used cocaine, weren't you subjected to urinalysis from time to time by the University when you were on the team?

A Yes.

Q How come -- how could you use the cocaine and not get caught?

A Because the urinalysis test was -- I thought it was basically a joke. Simple as that.

Q Now, about Mr. Gregg --

A What about Mr. Gregg?

Q Did he use cocaine with you on many of these occasions?

A Yes.

Q And did he have no concern about the urinalysis?

A I don't know.

MR. BONSIB: Objection, Your Honor. He will have to answer that for himself.

THE COURT: Yes. I would sustain the objection on that.

BY MR. MORROW:

Q Did you ever get caught by having any drug residue in your urinalysis?

A Once my -- once the year -- the year before the testing policy came into effect, I tested positive for marijuana.

Q Now, that's the other thing I just wanted to check. You indicated that on these ten occasions or so you used cocaine throughout this period of time, did you also use marijuana?

A Yes, sir.

Q Did you get charged by the State with possession of marijuana?

A When was I caught with marijuana?

Q I don't know. You say you admitted to them that you used it.

A To who, the State?

Q Uh huh.

A The Grand Jury?

Q Yes.

A Yes, sir.

Q You didn't get charged with that; did you?

A No, sir.

Q Now, you described the tragic circumstances under which Mr. Bias became ill and went into convulsions on this particular morning; is that right?

A Yes, sir.

Q And you made a statement as to why Brian had called his mother after he recognized it as a seizure.

I didn't quite understand what you had said.

A He had -- well, Lenny had told me before, long before, that Brian had a sister that -- who has epilepsy.

Q Oh, I see. I just wasn't sure.

Now, you said when this happened, your close friend is lying there on the floor. You understood that he was having some problems breathing?

A Yes, sir.

Q And you understood that his life was in danger at that time?

A Yes, sir.

Q And is that about the time that you said get the cocaine off the mirror?

A I can't exactly recall when I said that.

Q But that was right in that time frame?

A Somewhere between the time he had got off the phone and the paramedics -

Q By he, you mean Brian?

A Brian, yes.

Q And Brian got off the phone with his mother and then called 911?

A Yes.

Q What was the space of time?

A That he called 911? I thought it was immediately.

Q Okay.

And, so, at about that time, somewhere near your administering CPR?

A I mentioned to clean it up.

Q Okay.

And you mentioned that, of course, because you didn't want to get in trouble for having cocaine; right?

A Well, obviously, I knew we already were in trouble. I just didn't

want them to come in and see that. So, basically, yes.

Q Okay.

And you said David, meaning David Gregg, got rid of the cocaine; is that right?

A Yes.

Q Now, basically, you described how the room was cleaned up and the room was cleaned up again for the same reason, was it not, because you didn't want to get in trouble?

A The room was not cleaned because I didn't want to get in trouble. I usually keep my room cleaned regardless of any situation.

Since they had took Lenny out and I knew he was in serious trouble, I was waiting on a ride and to just have me do something, I decided to clean my room up because the beer bottles were, you

know, scattered everywhere, my trash can inside my room was overflowing, and I just wanted, you know, to get some kind of organization to it.

Q And, so, because you knew that the paramedics were coming, because of the fact that your close friend was in serious physical trouble, you didn't want anybody to think that you didn't keep a neat room; is that why you cleaned it up?

MR. BONSIB: Objection, Your Honor.

A I cleaned up the room after the paramedics left.

BY MR. MORROW:

Q I see.

So, the paramedics pick up Lenny and take him to the hospital and you understand -- you knew at that time that he was in serious problems, might die; right?

A Yes, sir.

Q And before you went to the hospital to find out, you thought maybe you would clean up your room first?

A While I was waiting on my ride, I cleaned up my room.

Q Okay.

Now, the items that you indicate were your handwriting that was in the trash, you don't know when those items went out into the dumpster; do you?

A No, sir.

Q Okay.

You knew it was in your room at some point, but you don't know if it's in your room on May 19th; do you?

A No, sir.

Q The day it got thrown out, it would normally get thrown out in that dumpster that Mr. Bonsib is so fond of showing pictures of?

A Yes, sir.

Q So, that is where it would be; right? All the trash in your room would be there no matter when it was put there; right?

A In most cases, yes.

Q Now, you indicated that you went out and tossed a bag in there?

A Yes, sir.

Q Just one bag?

A Yes, sir.

Q Now, you indicated, sir, that you seen Mr. Tribble with a beeper; is that right?

A Yes, sir.

Q And, as a practical matter, you saw Mr. Bias with a beeper too; didn't you?

A Yes, sir.

Q And as a practical matter, you saw Mr. Gregg with a beeper too; didn't you?

A No, sir.

Q You didn't see him with a beeper?

A No, sir.

Q You know he's got one now; don't you?

A I knew he had one. I didn't know that was his.

Q Mr. Gregg, I mean.

A Yeah, Mr. Gregg. Mr. Gregg.

Q Oh, he had one?

A I didn't know whether it was his or not.

Q In fact, it's common for members of the team to have beepers; isn't it?

A No.

Q It's not common?

Did you ever have a beeper?

A No, sir.

Q Now, this period of time in which you indicated that Mr. Bias brought cocaine to you on a number of occasions, eight occasions or so, what period of time was that?

A What do you mean?

Q Well, when did it start and when did it end?

THE COURT: Give us months or seasons of the year of something like that.

THE WITNESS: Well, it started my sophomore year, which was the year '84-'85.

THE COURT: The fall or the spring semester?

THE WITNESS: I would say fall.

THE COURT: Fall semester?

THE WITNESS: I'm not exactly sure.

THE COURT: Would it have been before Christmas?

THE WITNESS: Yes.

THE COURT: The fall semester actually ends by Christmas?

THE WITNESS: About Christmas.

THE COURT: Yeah. Go ahead.

BY MR. MORROW:

Q So, by the fall of '84, it started?

A Yes, sir.

Q And it continued up until June of '86; is that right?

A Yes, sir.

Q And you indicated that on many occasions, you used the coke at the Leonardtown Apartments; is that right?

A Yes, sir.

Q Now, is that actually one of the dorms on the campus?

A That's where we used to stay.

Q That's where the athletes stay?

A Used to stay until we moved.

Q So, you would do it in your apartment there or whose apartment?

A Our apartment.

Q Okay.

You were rooming with Lenny?

A Yes, sir.

THE COURT: Anybody else rooming with you?

THE WITNESS: John Johnson and Phil Nevin.

BY MR. MORROW:

Q And you would do it at those apartments; is that right?

A Yes, sir.

Q Now, you have indicated in response to some of Mr. Bonsib's questions that you know a good deal about the differing strengths and effects of cocaine?

A Yes, sir.

Q Okay.

Have you ever done any studies about comparing the effect of taking certain number of snorts of cocaine over a certain period of time?

A No, sir.

Q Isn't it true, Mr. Long, that you really don't know the difference between or the comparison between taking a lot of cocaine and taking cocaine that's particularly strong? Isn't that right?

A Do I know the difference?

Q Yes.

A Yes, I do know the difference.

Q And you could tell these ladies and gentlemen of the jury that you can tell the difference or the effect of a large quantity of cocaine as opposed to a quantity of cocaine that's of some purity?

A Yes.

MR. BONSIB: Objection, Your Honor. I don't understand the question. He says, on one hand, purity, and the other hand, quantity.

MR. MORROW: I would like to know how he can tell the difference. What is the effect.

MR. BONSIB: If that's the question, I would object.

THE COURT: The Court will pose the hypothetical to the witness. If the cocaine was fifty percent pure, it would take twice as much of that to be the equivalent of cocaine that was almost one hundred percent pure?

THE WITNESS: Correct.

THE COURT: You agree with that?

THE WITNESS: Yes, sir.

THE COURT: All right. Now, suppose you were using fifty percent pure cocaine. Would you use more of that in

order to get the same intoxication as you would one hundred percent pure stuff?

THE WITNESS: Yes, sir, you would use more.

THE COURT: And you could tell the difference?

THE WITNESS: Yes, sir.

THE COURT: Go on, Mr. Morrow.

BY MR. MORROW:

Q How would you know? Have you ever had it analyzed to find out what percent purity it is?

A No.

Q So, you really don't know the percent purity that you used, the stuff Lenny gave you; did you?

A Excuse me. Repeat the question.

Q You really didn't know what percent purity --

A No.

Q Okay.

And you didn't know what percent purity you had at Brian's house?

A No.

Q And you don't know what percent purity you had on June 19th; do you?

A No.

Q So, all this is basically a guess on your part; isn't it?

A I guess you could say that.

Q I guess you could.

MR. BONSIB: Objection to comments of counsel, Your Honor.

THE COURT: Yes. Don't comment, Mr. Morrow.

BY MR. MORROW:

Q Now, in addition to the point that I made about the Grand Jury testimony about from whom you obtained the cocaine on those other occasions and used it, you haven't always told this story that you

told the ladies and gentlemen here today in the past; have you?

A I don't understand what you're asking.

Q You have given a few different variations of this story from time to time; haven't you?

MR. BONSIB: I object to the form of the question. If he's got some different times, let's get to them.

THE COURT: Yeah, I agree with you. Have you got anything different, Mr. Morrow?

MR. MORROW: Well, I think I can scrape something up, Your Honor.

THE COURT: All right.

BY MR. MORROW:

Q Now, as a practical matter, didn't you originally tell Officer Johnson -- you know who Officer Johnson is; don't you?

A No, sir.

Q One of the police officers that interviewed you?

A No police officer interviewed me.

Q No?

At Leland Memorial Hospital, didn't you tell Officer Johnson that Mr. Bias had entered your room at 6:00 a.m.? You remember telling a police officer that?

A I can't recall.

Q You can't recall.

Did you tell --

THE COURT: Mr. Morrow, for the record, can we identify what Police Department Officer Johnson is with?

MR. MORROW: That's Officer Johnson of the University of Maryland Police Department, Your Honor.

THE COURT: All right. Does that refresh your memory any, Mr. Long?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. MORROW:

Q It doesn't refresh your memory. You don't remember telling anybody that Lenny came in at 6:00 a.m. and not 2:00 a.m. as you testified here today?

A That he came in at 6:00?

Q Uh huh.

A Instead of 2:00?

Q Yes.

A No, I don't think I told anyone that.

MR. BONSIB: Perhaps if counsel has some statement, he could show it to the witness and the witness could attempt to refresh his memory if such a statement exists.

THE COURT: Do you have such a thing, Mr. Morrow?

MR. MORROW: Well, I always appreciate help from Mr. Bonsib, Your Honor. I was planning on doing it a different way, but I can do it that way.

THE COURT: All right. He's just saying it might refresh the witness' memory.

(Thereupon, a conference was held at the trial table between the attorneys.)

MR. BONSIB: Thank you, Mr. Morrow.

MR. MORROW: Let me get a drink of water here and I'll be right with you, Mr. Long.

THE COURT: Mr. Morrow, let's mark it for the record. That would be what, Defendant's 5, Madam Clerk?

THE CLERK: No. We're up to Number 8. I have marked Defendant's 4, 5, 6 and 7.

THE COURT: All right. We will mark this 8.

MR. MORROW: Your Honor, before I forget, why don't I put these in now and we'll keep it all straight with the Clerk.

THE COURT: You have seen it, Mr. Bonsib?

MR. BONSIB: Yes, Your Honor. We have no objection to it.

THE COURT: Ladies and gentlemen, we're going to admit -- what's the numbers, Madam Clerk?

THE CLERK: Defendant's 4, 5, 6 and 7.

THE COURT: 4, 5, 6 and 7. They're the docket page and a copy of the charging document on the charges that have been brought by the State of Maryland

against Mr. Moore. One of which is the juvenile charge and the other two are the adult court charges.

MR. MORROW: That's correct. Your Honor please, 4 is the juvenile charge which is still pending. 5 is the -- I'm sorry. I sorry. 4 is the juvenile charge on which Mr. Green was waived, but in which no action was taken in Criminal Court. 5 is the juvenile charge that is still pending against Mr. Green.

THE COURT: You mean Mr. Moore.

MR. MORROW: I mean Mr. Moore. I'm sorry, Your Honor. 6 is the indictment pending against Mr. Moore for burglary. And 7 is the indictment pending against Mr. Moore for housebreaking and theft.

THE COURT: All right. They're all admitted and can go back to the Jury Room. Now we're marking 8; is that right?

MR. MORROW: That's correct, Your Honor. That's my only copy, Your Honor. Could I possibly get one made?

THE COURT: We'll get a copy made at the appropriate time.

MR. MORROW: Thank you, Your Honor.

BY MR. MORROW:

Q Now, Mr. Long, I'm going to show you what has been identified as Defendant's Exhibit Number 8 for identification purposes and ask you if you could take a look at that, specifically on the second page. You are free to read the whole thing if you would like. And I have highlighted a portion there. If you would look at that and see if that refreshes your recollection at all.

(Thereupon, the witness reading same.)

A What does this say right here

(indicating)?

MR. MORROW: I assume Mr. Bonsib won't object if I suggest that i-n-d-s is police abbreviation for individuals?

MR. BONSIB: I believe that that is correct in this statement.

THE COURT: All right.

THE WITNESS: What is this (indicating)?

MR. MORROW: I apologize for the quality of the copy, Your Honor, but that's what I received.

THE COURT: I understand.

BY MR. MORROW:

Q Sir, does that refresh your recollection?

A To some extent, yeah.

Q Okay.

And Officer Johnson indicates that --

MR. BONSIB: Objection, Your Honor. If his memory is refreshed, he's to testify from his memory as to it being refreshed.

THE COURT: Yes, Mr. Morrow.

MR. MORROW: All right, Your Honor.

BY MR. MORROW:

Q Now, let me ask the question again -- as a matter of fact -- excuse me. As a matter of fact, the story that you told the ladies and gentlemen of the jury here this afternoon is a little bit different than the story that you told Officer Johnson on the morning of June 19th; isn't that correct?

A You have to take into consideration, like I said --

MR. BONSIB: I think he should be permitted to answer.

THE WITNESS: What story --

THE COURT: You can answer that "yes" or "no", and then if you want to explain your answer, I will allow you to do it.

MR. BONSIB: Thank you, Your Honor.

THE WITNESS: Which story are you talking about?

BY MR. MORROW:

Q The story about Lenny coming home at 2:00 o'clock is different from what you told Office Johnson?

A Yes.

Q Okay.

In fact, you told Officer Johnson that Lenny had come in at 6:00 o'clock, 6:00 a.m.; right?

A I can't recall.

Q Well, I thought you just said that that refreshed your recollection?

A That refreshed my recollection of me speaking with him at the hospital.

Q Okay.

But it didn't refresh your recollection as to --

A That that is what I said, no.

Q Okay.

So, you don't recall telling Officer Johnson --

MR. BONSIB: Objection, Your Honor.

A I don't know why I would tell him that.

THE COURT: Well, we'll bring Office Johnson, if necessary, but you don't recall what is in Exhibit 8 there as being your statement?

THE WITNESS: I recall some of the statement because I did talk to the officer at the hospital because he was trying to get information about what had

happened and he wanted me to mention drugs, but I didn't, and he was just asking me questions and I basically really wasn't even paying attention to him.

BY MR. MORROW:

Q Isn't it a fact that you told Officer Johnson that Lenny had come in at 6:00 a.m., that he had laid down and put his head back and went into seizures? Isn't that true?

A I said -- I remember mentioning he had laid his head back and went into seizures. I don't remember mentioning he had come in at 6:00.

Q All right.

And you recall that the officer was specifically asking you as to whether he had -- Lenny had had any drugs, and you denied that he had any drugs; isn't that true?

A Yes, sir.

Q And that was a lie; wasn't it?

A That he didn't have any drugs?

Q Right.

A Yes, sir.

Q It's also a lie that he came in at 6:00 o'clock; wasn't it?

A I didn't say he come in at 6:00.

Q Okay.

Now, as a matter of fact, that wasn't the first time that you had lied on the morning of June 19th; was it?

MR. BONSIB: Again, Your Honor, I object. Let's get to the time.

THE COURT: Yeah, let's get to the time, what you're aiming at.

BY MR. MORROW:

Q Now, as a matter of fact, when the emergency medical personnel came onto the scene of 1103 Washington Hall, you lied to them too; didn't you?

A No, sir.

Q You didn't tell them when they asked if Lenny had been using any drugs, you didn't tell them no?

A Yeah, I did tell them no.

Q Uh huh.

Well, that was a lie; wasn't it?

A I didn't know exactly what you were talking about.

Q So, you did lie to the emergency medical people that came into 1103 Washington Hall.

A Yes.

Q Okay.

So, that's two lies then; right?

(Thereupon, there was no response from the witness.)

Q Now, those people were working on your close friend, medical personnel, and he was in trouble, and, yet, you still denied that he had used any drugs; isn't that right.

A Yes.

Q And you did that because you didn't want to get in trouble; isn't that right?

A I did that because I didn't think that he would pass away and I didn't really want to ruin his reputation.

Q You indicated, Mr. Long, that you had seen Mr. Tribble with a beeper.

Did you happen to see him with one on June 19th?

A No, sir.

Q You did not.

Now, it's true, isn't it, Mr. Long, that you are represented, as His Honor has indicated, by Mr. Goldstein, a very fine member of the Maryland Bar?

A I don't know about the Maryland Bar, but I'm represented by Mr. Goldstein.

MR. BONSIB: We'll stipulate he is fine and he is a member, Your Honor.

MR. GOLDSTEIN: I appreciate it.

MR. MORROW: I didn't know he was going to say that or I wouldn't have asked him.

BY MR. MORROW:

Q And Mr. Goldstein has represented you throughout this investigation; is that correct?

A Yes, sir.

Q And he told you about the charges of obstruction of justice?

A Yes, sir.

Q And I'm sure he told you that that was punishable by a ten thousand dollar fine and three years in jail? Did he tell you that?

A Yes, sir.

Q Okay.

And you were charged with possession of cocaine as well; isn't that correct?

A Yes, sir.

Q And I'm sure that Mr. Goldstein explained to you that that was punishable by up to four years in jail and a twenty-five thousand dollar fine?

A Yes, sir.

Q And you didn't have thirty-five thousand dollars sitting around; did you?

A No, sir.

Q And you didn't much feel like spending seven years in jail either; did you?

A No, sir.

Q So, Mr. Goldstein, as a good criminal lawyer, told you that you had some options in regard to those charges; didn't he?

A Yes, sir.

Q And one of those options was cooperating with the State; isn't that correct?

A Yes, sir.

Q And, so, the bargain with the State would be that the State would dismiss the charges if you came in and gave testimony which they believed to be truthful; is that correct?

A Yes, sir.

Q And you would walk away a free man; is that correct, if you cooperated with the State and testified?

A Yes, sir. Yes, sir.

Q And you wouldn't have to spend seven years in jail?

MR. BONSIB: Objection, Your Honor. There's no testimony he would spend seven years in jail in this.

THE COURT: That is correct. The sentencing is up to the discretion of the sentencing judge, ladies and gentlemen of the jury.

BY MR. MORROW:

Q You wouldn't go to jail and you wouldn't go to trial; is that right?

A He didn't say anything about not going to trial.

Q Now, when you originally spoke with Mr. Marshall, when was that?

A October 16th, 1987 -- '86.

Q Okay.

Was that before you went in to the Grand Jury?

A Yes, sir.

Q And you spent some time with Mr. Marshall with your attorney present?

A Yes, sir.

Q Did Mr. Marshall accept what you said, or did he have some corrections that he wanted to make to your testimony?

MR. BONSIB: Objection to the form of the question, Your Honor.

THE COURT: No. I think that's a fair question. Overruled.

A Repeat the question.

BY MR. MORROW:

Q Did Mr. Marhsall accept what you said, or did he have some corrections that he wanted to make to your testimony?

A Some corrections.

Q He had a few corrections; didn't he? He didn't like the way your testimony came out the first time you told it; did he?

A No.

Q So, you made some changes and he was happy with those changes; wasn't he?

A I don't know.

Q And after you gave the testimony that Mr. Marshall accepted, then he took you and put you in the Grand Jury; didn't he?

A Yes, sir.

Q And after you gave him the testimony that he wanted and he put you in

the Grand Jury, then he dismissed the charges; didn't he?

A A week or so later.

Q Did you have ever, Mr. Long, an agreement with -- an agreement with Leonard K. Bias to obtain drugs?

A Did I have an agreement?

Q Any kind of an agreement, an agreement that he would distribute drugs to you?

A No, sir.

Q Did you ever have an agreement with Brian Tribble?

A No, sir.

Q Did you ever have an agreement with David Gregg?

A I never had an agreement with no one.

Q You never had an agreement with anybody at all; did you?

A No, sir.

Q Do you know Terrence Moore?

A The name is familiar.

Q At any time that you received drugs from Leonard Bias, was it ever prearranged? Do you know what I mean by prearranged?

A No, sir.

Q Did you have any advance agreement that --

A No. No advance agreement.

Q It just happened. Every once in a while, he would have a small amount of cocaine and you would share it; is that right?

A Yes, sir.

Q Never prearranged and never based on any agreement; isn't that true?

A Yes, sir.

Q And you never paid any money for it; isn't that true?

A Yes, sir.

THE COURT: Is it the Court's understanding your testimony is that you have never bought cocaine?

THE WITNESS: I never bought cocaine.

BY MR. MORROW:

Q And you had no arrangement with anybody about the use or distribution of cocaine; isn't that the truth?

MR. BONSIB: Your Honor, what's the word "arrangement" mean, if I could ask counsel to clarify that? I'm not sure I understand that.

THE COURT: Well, the Court is going to ask a question along that. Did there ever come a time when you would say to somebody, let's go to a particular place, we're going to use cocaine, or I'll meet you some place; we're going to have a cocaine party, or something like that?

THE WITNESS: No.

THE COURT: The cocaine would come up after you got together?

THE WITNESS: Usually -- most of the times they would have it, like I said, and he would just inform us when he had it. It was never like he would come out and say I'm going to do this and Friday we're going to get down on cocaine. It was never like that, if that's what you're asking.

BY MR. MORROW:

Q I just want to make sure the jury clearly understands that.

Now, were you aware, Mr. Long, that the State has alleged that you are a co-conspirator with Mr. Bias, Mr. Tribble, Mr. Gregg and others --

MR. BONSIB: That is not correct, Your Honor.

THE COURT: Wait a minute. Come up here.

THE WITNESS: What do you mean by co-conspirator?

THE COURT: Come up, gentlemen. Wait a minute. Don't answer that question.

(Thereupon, a conference was held at the bench which was not transcribed for purposes of this transcript.)

MR. BONSIB: Excuse me for a moment, Your Honor.

THE COURT: All right. Come on back up to the witness box, Mr. Long.

MR. MORROW: That's all right, Your Honor. I was going to say thank you. I have no further questions of Mr. Long.

THE COURT: All right. Well, maybe Mr. Bonsib might have some questions.

MR. BONSIB: Just a couple of quick questions, Your Honor.

THE COURT: Come up again, Mr. Long.

THE CLERK: Mr. Long, you remain under oath. You may have a seat.

(Thereupon, the witness retaking a seat on the witness stand.)

REDIRECT EXAMINATION

BY MR. BONSIB:

Q Mr. Long, the night -- the night that you went up to Mr. Tribble's apartment, did you have any communication with anybody before you went up to that apartment?

A About what?

Q About going up to the apartment.

A Yes, Lenny.

Q What did Lenny do?

A Like I said, after the game, we went back to our apartment and he had called me on the phone and said that we --

MR. MORROW: Objection.

THE COURT: Sustain the objection.

MR. BONSIB: Your Honor, at this -- if we can approach the bench?

THE COURT: All right.

(Thereupon, a conference was held at the bench which was not transcribed for purposes of this transcript.)

THE COURT: You want to restate the question, or do you want the Reporter to read it?

MR. BONSIB: I'll restate it, Your Honor.

BY MR. BONSIB:

Q Mr. Long, the question I asked you before was, when Mr. Bias called, what did he tell you?

A He had said that he was on his way to pick me and David up and that we were going up to Brian's apartment.

Q When he arrived, did he have any further discussion with you about what was going to go on up there?

MR. MORROW: Objection.

THE COURT: Overruled.

A He said -- one of the phrases, "It's that time."

BY MR. BONSIB:

Q "It's that time." Did that have any special meaning to you in the context of that conversation?

MR. MORROW: Objection.

THE COURT: Overruled.

A Yes.

BY MR. BONSIB:

Q What did it mean?

A It was time to drink beers or do some cocaine.

Q When you had your first meeting with Mr.Marshall, Mr. Morrow said that Mr.

Marshall didn't like what you said the first time.

Would you just tell us what happened during that whole meeting so the jury gets a full picture of what happened there?

A During the meeting? What meeting are you talking about?

Q Well, the meeting you were talking with Mr. Morrow about. He said you had some meeting with Mr. Marhsall and Mr. Marshall, according to him, didn't like the first thing you said and then you said something else.

A Well, as I recall, we were in Mr. Marshall's office. I personally don't think that --

MR. MORROW: Objection.

A -- that Mr. --

THE COURT: Don't -- just tell us what transpired. Not your thoughts or comments.

THE WITNESS: Well, what happened was we were sitting in there. He was asking us what had happened, and as we were explaining, I was -- I had a cold at the time and I sniffed, and he said something smart about like you expect me to think that you have a cold. I know you're probably still using cocaine.

And -- but that was one of the -- one of the interruptions that we had. And another reason that he didn't go by what we said is because we didn't know what had been said --

MR. MORROW: Objection. Objection.

THE COURT: Overruled.

MR. MORROW: He's saying why Mr. Marshall didn't believe what he said.

THE COURT: No. What did Mr. Marshall say, not what you guess what he said or guess what was in Marshall's mind? What did Mr. Marshall say?

THE WITNESS: Mr. Marshall said that --

MR. MORROW: I would object to that too, Your Honor, but less strongly.

THE COURT: No. I think we have opened up the door on that. I'll overrule your objection.

Go ahead.

THE WITNESS: Mr. Marshall had said that you expect me to believe this is your first time using cocaine, and we responded yes.

BY MR. BONSIB:

Q When you first started out talking to Mr. Marshall, you were lying to him; weren't you.

A Yes, sir.

Q Did there come a time when you started telling the truth?

A Yes, sir.

Q After you were finished talking to him, you went in in front of the Grand Jury?

A Yes, sir.

Q Did you tell the truth or did you continue with these lies?

A I told the truth.

Q What about today?

A I told the truth.

Q When you were in that room the morning of June 19th, Mr. Morrow asked you if you passed the cocaine to somebody and you said yes; correct?

A Yes.

Q And he asked you if you distributed cocaine then or if you were charged with distribution; didn't he?

A Yes.

Q Did Mr. Tribble --

MR. MORROW: Is this a quiz on what my questions were, Your Honor?

THE COURT: No. Go on. Let's see what the next question is.

MR. BONSIB: Thank you, Mr. Morrow.

BY MR. BONSIB:

Q Mr. Long, did Mr. Tribble pass the cocaine to anybody?

A Yes. So did Mr. Gregg and Mr. Bias.

Q Everybody was distributing it to somebody else at some time during the course of that night?

A Yes, sir.

Q Had you ever seen the quantity of cocaine at any one time that you laid out there that was on the mirror the night of June 19th?

MR. MORROW: Objection. Beyond the scope of cross.

THE COURT: Sustain the objection.

BY MR. BONSIB:

Q Prior to coming in to testify today, you sat down and talked with Mr. Morrow about your testimony; didn't you?

A Yes, sir.

Q So, you explained to him everything that you were going to say here today?

A Yes, sir.

Q And you told him essentially the same thing that you're saying right now?

A Yes, sir.

MR. MORROW: Are you going to make me a witness now?

MR. BONSIB: Nothing further, Your Honor.

THE COURT: All right. Now, Mr. Long, there's a rule on witnesses, which means that you are not to discuss your testimony within this -- that has been in this courtroom with anybody until this trial is over. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: After the trial, you can write your memoirs and what have you, but right now, you can't discuss it. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: All right. Now, we can excuse Mr.Long and let him go back to Richmond, or do we need him?

MR. BONSIB: Your Honor, I think he can be excused. I know he's in contact with Mr. Goldstein and --

THE COURT: All right. We're going to excuse you, Mr. Long. Stay in contact with Mr. Goldstein in the event

that you are needed later in the trial, but apparently not.

THE WITNESS: Thank you.

(Thereupon, the witness stepping down.)

THE COURT: And with that, we're going to stand in recess until tomorrow morning, or adjourn until tomorrow morning.

And, ladies and gentlemen, is 8:45 all right with you all meeting the Sheriff's bus and we'll try to get going as near to 9:00 o'clock as possible.

MR. BONSIB: Your Honor, before we leave the bench, could we just make a record of the fact we're going to put that cocaine in the bag that you talked about?

THE COURT: All right. We're going to be on the record.

Ladies and gentlemen of the jury, you can leave the courtroom.

(Thereupon, the jury left the courtroom.)

THE COURT: Come up to the Bar, counsel.

(Thereupon, a conference was held at the bench which was not transcribed for purposes of this transcript.)

(Thereupon, the Court adjourned for the day.)

APPENDIX E

(Thereupon, the Court resumed session at 10:30 a.m.)

(Thereupon, the witness retaking a seat on the witness stand.)

THE COURT: Mr. Luckett and Mr. Sheriff Feeney, you all want to step up on the bench here for a minute?

You ready, Mr. Morrow?

MR. MORROW: Yes, Your Honor.

THE COURT: All right. Bring the jury in, Mr. Luckett.

THE BAILIFF: All right, Your Honor.

(Thereupon, the jury was brought back into the courtroom and took seats in the jury box.)

THE CLERK: Mr. Gregg, you remain under oath.

THE COURT: All right, Mr. Morrow, we got fifteen people back in the courtroom.

MR. MORROW: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. MORROW:

Q Mr. Gregg, let me just clear up something initially. Did I hear you say that you told Mr. Baxter and Speedy Jones about the unfortunate events of June 19th?

A Yes.

Q You told them a little later on, though; didn't you? You didn't tell them that the first thing in the morning on June 19th; did you?

A No.

Q That's right.

In fact, when they talked to you initially, you told them -- well, you didn't say anything much, did you, when they asked you what was the problem?

A No.

Q Is that right, you didn't say anything?

A Right.

Q So, when you told -- when you say to the ladies and gentlemen of the jury that you told Mr. Baxter and you told Mr. Jones, it was some time later you fessed up to them, so to speak?

A In the hospital.

Q And just so we have things clarified here, when the medical personnel came in there in the morning of June 19th, they asked if Mr. Bias had been using any drugs; isn't that right?

A Yes.

Q And you lied to them; didn't you?

A I didn't say anything.

Q Oh, you didn't tell them that he hadn't been using drugs?

A No.

Q Mr. Long said that?

A Yes.

Q And you didn't correct him; did you?

A No.

Q Your friend was lying there on the floor -- he was your friend; wasn't he?

A Yes.

Q He's lying thereon the floor dying, the medical personnel come in and wanted to get some information that may save his life, and you let Mr. Long go ahead and lie to them; is that right?

A Yes.

Q And your friend is lying there on the floor dying and then the first thing that came into your mind was to maybe to in and clean up the room; is that right?

A Yes.

Q And you clean up the room because you didn't want to get in trouble; is that right?

A Wrong.

Q Wrong?

A Yes.

Q Oh, you're just a neat person?

A No.

Q Now, what was Mr. Bias wearing when he went out that night on June 19th, Mr. Gregg?

THE COURT: You mean when he left in the earlier evening, Mr. Morrow?

MR. MORROW: Yes. Thank you, Your Honor.

THE COURT: Yes.

THE WITNESS: Blue jeans and shirt.

BY MR. MORROW:

Q Blue jeans and a shirt?

A Yes.

Q And that was when he went out the first time after he had talked with Madelyne Woods?

A Yes.

Q Okay.

So, he walked out wearing blue jeans and a shirt?

A Yes.

THE COURT: Did he have any jewelry on?

THE WITNESS: I'm not sure.

BY MR. MORROW:

Q And that was what, about 11:00, 11:30 that night?

A Yes.

Q Is that a fair statement?

(Thereupon, there was no response from the witness.)

Q Now, another thing I noticed when Mr. Bonsib asked you if you -- in fact, he said you have seen State's Exhibit 20. That's this chart here. He said you have seen that before; is that correct?

A Yes.

Q I guess you have talked with the State's Attorney a few times in preparation for your testimony here today; haven't you?

A Yes.

Q Mr. Long is a pretty good friend of yours too; isn't he?

A Yes.

Q And I suppose you have talked with him a few time about your testimony here today; haven't you?

A Yes.

Q Now, you say it was about 2:00 to 2:30 that you saw Mr. Bias return?

A Uh huh. Yes.

Q And he was very excited?

A Yes.

Q He was very loud?

A Yes.

Q He knocked on your door, said let's celebrate?

A Yes

Q Or words to that effect?

A Yes.

Q Did it appear to you that he was intoxicated at that time?

A No.

Q No?

Now, you understood based upon the events of that day that Mr. Bias wanted to have a party; is that correct?

A Yes

Q That was your understanding as a result of his words, "Let's celebrate." And he had with him at that time -- was he wearing the same clothes as when he left?

A Yes

Q Was he still wearing blue jeans?

A Yes.

Q And did he have anything with him?

A When? When he came back?

Q When he came back in between 2:00 and 2:30.

A Yes.

Q Okay.

Did he have a bag with him?

A Yes.

Q Did he have -- it was a paper bag; right?

A Yes.

Q Did he also have a Louis Vuitton bag that he carried around with him?

A He had one, but I'm not sure if he had it that night.

Q And you were talking on the phone and he said let's have a party, so you hung up the phone and then you left your room to go out and get some beer; is that right?

Q Okay.

And you got a beer and Mr. Long had a beer?

A Yes.

Q And then you went to Mr. Long's room?

A Yes.

Q You were the first one in the room before except for Brian Tribble and Len Bias; is that right?

A Yes.

Q And when you walked in the room, you saw what appeared to be a white powder on a mirror; is that right?

A Yes.

Q And you don't know where that powder came from; do you?

A No.

Q Now, you mentioned some words about a conversation Mr. Tribble had in response to a question from you, well, where did that come from. Of course, you knew it was cocaine; didn't you?

A Yes.

Q And you had seen cocaine several times before?

A Yes.

Q And you said, hey, where did you get that stuff? Is that pretty much what you said?

A Yes.

Q And your testimony today is that Mr. Tribble said it came from the bottom of the stash?

A Yes.

Q Now, are you sure that he didn't say they got it from the bottom of the stash?

A He could have.

Q Uh huh.

It could have been they got it from the bottom of the stash; right?

A Could have.

Q And you don't know who "they" is; do you?

A No.

Q Now, you indicated that you ingested this cocaine by the use of some straws that were in Mr. Long's room.

Do you know why Mr. Long had straws in his room, by any chance?

A Sodas.

Q Excuse me?

A Sodas.

Q Oh, not to snort coke?

A No.

Q They just happened to be there that night?

A Yes.

Q Okay.

And the straws, you don't just take out one of these eight-inch straws and use it to snort coke; do you?

A Could you rephrase that?

Q You don't just take out one of these eight-inch McDonald straws and snort the coke through that; do you? You have to do something to the straw; don't you?

A Yes.

Q What do you do to it?

A You cut it.

Q You cut it?

A Uh huh.

Q Any special way you cut it?

A You cut it like in an angle.

Q And Lenny Bias cut the straws that night; is that your testimony?

A Yes.

Q Any discussion about that?

A No.

Q Now, you -- when your friend was lying on the floor dying, you took the mirror with the cocaine back to your room; is that right?

A Yes.

Q And that was at the suggestion of Mr. Long?

A Yes.

Q So, his concern that morning was to get the room cleaned out while his friend was lying there too; is that right?

MR. BONSIB: Objection, Your Honor. Mr. Long will have to speak to that, Your Honor.

MR. MORROW: Maybe counsel will let me finish my question, Your Honor.

THE COURT: Okay. finish your question, Mr. Morrow.

BY MR. MORROW:

Q So, Mr. Long's concern was getting his room cleaned up in the morning while his friend was lying there dying on the floor; is that right?

MR. BONSIB: Objection.

THE COURT: Overruled.

You can answer it, if you know.

A No, it wasn't.

BY MR. MORROW:

Q It wasn't?

But he told you to get the cocaine out of the room; isn't that right?

A Yes.

Q And, so, you took it in and you put it into a bag?

A Yes.

Q And then you gave that bag to Mr. Tribble; is that your testimony?

A Yes.

Q And you never saw what happened to it after that; did you?

A No.

Q You don't know who took --

THE COURT: The Court understands, though, that some of the cocaine was spilled in the process of pouring it; is that correct?

THE WITNESS: Yes.

THE COURT: Did you ever go back to clean up that spill?

THE WITNESS: Yes.

THE COURT: When was that?

THE WITNESS: Right after I finished cleaning -- after I handed it to -- after the paramedics had left.

THE COURT: What did you do with the spilled material?

THE WITNESS: Sprayed some carpet cleaner on the carpet.

BY MR. MORROW:

Q I'm sorry. What did you do?

A Sprayed some carpet cleaner on the carpet, rubbed it in with a towel.

THE COURT: You're talking about this white powder carpet cleaner you buy in a grocery store and sprinkle on the carpet to clean it up?

THE WITNESS: Yes.

THE COURT: All right. Go ahead, Mr. Morrow.

BY MR. MORROW:

Q Now, you said Mr. Nevins was in the room there?

A Yes.

Q And he didn't see it?

A No.

Q And that is because he was asleep; right?

A Yes.

Q Now, part of the reason that you spilled the cocaine was because you were intoxicated; is that right?

A Part of it, yes.

Q You had had some beers in addition to the coke that you had had?

A Yes.

Q In the past, sir, if I understand your testimony correctly, you have indicated that you have snorted coke approximately eight to ten times since your freshman year.

Is my recollection of your testimony correct?

A Yes.

Q And on each of the occasions in which you were in the company of Mr. Bias when you snorted cocaine, it's your testimony, if I understand it correctly, that it was he who supplied that cocaine; is that correct?

A Some of it.

Q Some --

A Some of the five time, yes.

Q some of the five times you were with him?

A Yes.

Q Well, most of the times you were with him did he supply the cocaine?

A Yes, about three times. About three.

Q And you indicated that there were only two times, June 19th and some time in January, where you were with Brian Tribble in the presence of cocaine?

A Yes.

Q Now, on that January occasion, Mr. Gregg, isn't it true that Mr. Tribble didn't stay up all night with you; he went to bed; isn't that right?

A Yes.

Q So, it was you and Lenny and Mr. Long who sat around staying up all night snorting cocaine; right?

A Most of the time. Most of the time.

Q Uh huh.

Now, you testified that the cocaine that you have used in the eight to ten times of your life that you have used it has had different effects; is that correct?

A Yes.

Q And you noted for the ladies and gentlemen of the jury that the different effects were based, based on your experience, on the quantity which you have

used rather than anything else; isn't that right?

A Yes.

Q Now, isn't is true -- isn't it true that when -- you met with Mr. Marshall some time back in October of 1986; is that correct?

A Yes.

Q He wasn't real pleased with you; was he?

A No.

Q He told you that -- you told him what you were going to tell him and he told you to get out?

A Yes.

Q He started screaming and yelling in that gentle and delicate fashion that he had --

MR. BONSIB: Objection to the comments of counsel, Your Honor.

THE COURT: No, I'm going to overrule it.

MR. BONSIB: Thank you, Your Honor.

BY MR. MORROW:

Q Is that right?

MR. BONSIB: Is that perhaps similar to counsel's method, Your Honor?

A. Yes.

BY MR. MORROW:

Q He told you to get out of the room, he didn't want to hear about liars; is that right?

A Yes.

Q And that's because his understanding and his belief of what happened in the room on June 19th, 1986 was different than what you were telling him; is that right?

A Yes.

Q But, of course, he wasn't in the room on June 19th, 1986; was he?

A No.

Q And you were in the room on June 19th, 1986?

A Yes.

Q And Mr. Long was in the room also; wasn't he?

A Yes.

Q And Mr. Tribble?

A Yes.

Q So, you were telling him and Mr. Long was telling him what happened and he said that's not what happened, you're lying; isn't that right?

A Yes.

Q And isn't it true, Mr. Gregg, that you saw your ability to walk away without going to jail, without being prosecuted, without coming to trial was kind of melting away like an ice cube in the hot sun; wasn't it?

A No.

Q No?

You thought that he was going to call you a liar and tell you to get out and you still had a deal? Is that what you thought?

A I had no deal.

Q Excuse me?

A I had no deal.

Q You had no deal.

Were you going in with Mr. Goldstein to talk to Mr. Marshall on the expectation -- you just wanted to perform a public and civic duty; is that right?

A Could you rephrase that?

Q Yeah. As a matter of fact, Mr. Gregg, the purpose of going in there with Mr. Goldstein and Mr. Gregg was for the purpose of making a please bargain; isn't that true?

A False.

Q Excuse me?

A No.

Q That's not true?

A Uh uh.

Q Mr. Goldstein just walked you up there to have a little morning chat with Mr. Marshall?

A We was to meet Mr. Marshall so we could go in front of the Grand Jury.

Q So, is it your testimony to these ladies and gentlemen of the jury that you had no idea or expectation of working out some kind of an arrangement whereby you would get immunity and you wouldn't go to jail; is that your testimony here?

A Can you rephrase that?

Q Yeah. Are you telling these ladies and gentlemen of the jury that you didn't have any expectation of working out some kind of a deal with the State in exchange for your testimony?

A No, I didn't.

Q You didn't have any idea about that?

A No.

Q Mr. Goldstein, this experienced criminal lawyer, didn't mention anything about that to you; did he?

A No, he didn't.

Q I see.

Well, can you explain to the ladies and gentlemen of the jury why Mr. Long had an understanding to that effect and you didn't?

A That's his opinion, not mine.

Q I see.

And you didn't talk it over with him before you went in there?

A No, I didn't.

Q Were you and Mr. Long together when you talked to Mr. Goldstein?

A Yes.

Q Uh huh.

And so, Mr. Long picked up some kind of an understanding and you just didn't happen to pick it up?

A Right.

Q Now, did you know, and, as a matter of fact, Mr. Goldstein explained to you that you were facing obstruction of justice; didn't he?

A Yes, he did.

Q And did he tell you that that was punishable by up to three years in the Maryland Department of Corrections?

A Yes.

Q And he told you that you were also charged with possession of cocaine; is that right?

A Yes.

Q Did he tell you that that was punishable by up to four years in the Maryland Department of Correction?

A Yes

Q Did you want to go to the Maryland Department of Correction?

A No, I didn't.

Q You ever been there?

A No.

Q Did he tell you that those two offenses were punishable by a fine of up to thirty thousand dollars?

A I'm not sure.

Q Did you want to pay a fine of thirty thousand dollars?

A No, I didn't.

Q And, so after Mr. Marshall told you that you were lying and he didn't accept your testimony and Mr. Long's testimony of what happened in that room on June 19th, then you change your testimony; isn't that right?

A Yes.

Q And then you change your testimony and then you went in and you gave that

testimony to the Grand Jury; is that correct?

A Yes.

Q And it's your testimony to these ladies and gentlemen of the jury that the second version of your testimony is what is the truth; is that your testimony, Mr. Gregg?

A Yes.

Q The State pretty much had you up against the wall; didn't they, Mr. Gregg?

A No.

Q They didn't?

A No.

Q Well, I thought I heard you say you didn't want to go to the Maryland Department of Correction?

A I didn't.

Q Now, it's true, is it not, Mr. Gregg, that at no time did you ever have an agreement or an understanding or an

arrangement with Len Bias that he would supply you with drugs; is that correct?

A Could you rephrase that?

Q You never had an arrangement, understanding or agreement at any time that Len Bias would supply you with drugs; isn't that true?

A I didn't.

Q You did not have any agreement of that nature? That's true; isn't it?

A Yes.

Q Okay.

And it's also true, isn't it, that you never had an agreement, understanding or arrangement with Brian Tribble that he would supply you with drugs? That's true; isn't it?

A Yes.

Q Mr. Gregg, did you ever own a beeper?

A Yes.

Q You did.

A Yes.

Q Were you a drug dealer?

A No, I wasn't.

Q You weren't a drug dealer, but you owned a beeper?

A Yes.

Q In fact, there's a lot of people that have beepers; isn't that true?

A Yes.

Q For a lot of reason?

A Yes.

Q You have a beeper now; don't you?

A No.

Q You don't?

You have sold drugs on occasion yourself; haven't you?

A No.

Q You never have?

A No.

Q You sure about that?

A Positive.

MR. BONSIB: Your Honor -- well, never mind.

BY MR. MORROW:

Q You used other drugs besides cocaine, didn't you --

A Yes

Q -- during this period of time?

A Yes.

Q What else did you use?

A Marijuana.

Q You used a lot; didn't you?

A Yes.

Q You never sold that to anybody?

A No.

Q You know a Barette Palmer?

A No.

Q You ever used cocaine with her?

A No.

Q You didn't?

You don't know anybody named Terrence Moore; do you?

A No.

Q And you never had any kind of an agreement with him at any time; did you?

A No.

MR. MORROW: No further questions.

THE COURT: Mr. Bonsib or Mr. Harding?

MR. HARDING: Court's indulgence.

(Thereupon, a conference was held at the trial table between Mr. Bonsib and Mr. Harding.)

REDIRECT EXAMINATION

BY MR. BONSIB:

Q Mr. Gregg, you indicated that you did clean up the room, but you told Mr. Morrow that it wasn't in order to avoid your getting in trouble.

Why did you clean up the room?

A To protect the image of Len Bias.

Q And if you hadn't cleaned up the room, what did you think would have happened with respect to Mr. Bias' image?

MR. MORROW: Objection.

THE COURT: Overruled.

A I didn't really think about it.

BY MR. BONSIB:

Q Then why did you clean up the room?

A Because I didn't want anybody to know what he was doing.

Q Mr. Morrow asked you if you had sat down and discussed your testimony with Mr. Goldstein and prosecutors and other people, and you said you had; correct?

A Yes.

Q In fact, you agreed to sit down with Mr. Morrow and tell him and answer all his questions in a meeting with just you, Mr. Morrow and your lawyer; right?

A Yes.

Q And you told him everything?

A Yes.

Q And that was a long time ago?

A Yes.

Q So, Mr. Morrow has known for a long time what you're going to say here today?

MR. MORROW: Objection.

THE COURT: Overruled.

A Yes.

BY MR. BONSIB:

Q. Are you trying to hide what you know from anybody?

A No.

MR. MORROW: Objection.

THE COURT: Overruled.

MR. MORROW: Your Honor, he's leading him.

THE COURT: I know, but it's valid redirect.

MR. MORROW: Valid leading?

BY MR. BONSIB:

Q When you went in the room the first time and you asked where the cocaine had come from, why did you ask that question?

MR. MORROW: Objection

THE COURT: Overrruled.

A Because it was a large amount.

BY MR. BONSIB:

Q When you first met with Mr. Marshall and you told him what you have acknowledged was a lie, why did you tell him a lie at first?

A Because that's the story we had told from the beginning.

Q And why had you told that story from the beginning?

A We be trying to protect the image of Len Bias.

Q Why did you finally give Mr. Marshall a different version?

A Because we talked it over with our lawyer and he said to tell the truth.

THE COURT: You're using the word "we told a story". Who is "we"?

THE WITNESS: Terry Long.

THE COURT: You and Terry Long?

THE WITNESS: Yes.

THE COURT: Are you telling the jury and the Court that you and Terry Long got together and created a story?

THE WITNESS: Somewhat.

THE COURT: Go ahead, Mr. Bonsib.

BY MR. BONSIB:

Q And you all stuck with that story until this conversation with your lawyer?

A Yes.

Q And after Mr. Goldstein told you to tell the truth, what did you and Mr. Long decide to do?

A Tell the truth.

Q Finally, sir, what was your understanding of what was going on when you went there to meet with Mr. Marshall?

You told Mr. Morrow you didn't think you had any kind of a deal.

What was your understanding of why you were meeting with him?

A That if we went before the Grand Jury, the charges would be dropped.

Q And that was your understanding?

A Yes.

MR. BONSIB: Nothing further, Your Honor.

THE COURT: All right, Mr. Gregg, there's a rule on witnesses, which means you can't discuss your testimony until this trial is over.

MR. MORROW: If I could have a moment, Your Honor, I might want to ask him one or two more questions.

THE COURT: All right. Certainly, Mr. Morrow.

RECROSS EXAMINATION

BY MR. MORROW:

Q Let me just ask you a couple of questions, Mr. Gregg.

You have indicated in response to Mr. Bonsib's questions that you and Mr. Long had cooked up a story, essentially; is that correct?

A Yes.

Q And that was the story that you told basically the medical personnel?

A I didn't talk to the medical personnel.

Q You didn't talk to them? Didn't you tell some people that you had just been drinking that night?

A Yes.

Q You told your teammates that?

A Yes.

Q Uh huh.

And didn't you tell Officer Johnson at the hospital that you had just been drinking that night?

A No.

Q Didn't you tell him that you were awakened by Mr. Bias making noise going into seizures?

A No, I didn't tell him that.

Q You did not tell him that?

A No.

Q Didn't you tell him that the first time you saw Mr. Bias on the morning of June 19th was 6:00 o'clock or 6:30?

A No, I didn't.

Q Now, I'm going to show you a piece of paper and I'm going to show it to you to see if maybe your recollection is bad here. Why don't you take a look at that. Disregard what I have highlighted there, but look at the part that I have underlined. See if maybe that refreshes your recollection.

(Thereupon, the witness reading same.)

Q Does that refresh your recollection, Mr. Gregg?

A No, it doesn't.

Q It does not?

A No.

Q And it's your testimony here today under oath that you never told Officer Johnson that you were asleep when Mr. Long woke you up and indicated that Lenny Bias was having problems?

A I never told the officer that.

Q Did you ever tell him that Mr. Long told you to call the Fire Department?

A No, I never spoke to an officer at all.

Q Do you know who Officer Johnson is?

A No, I don't.

Q So, it's your testimony that you didn't tell this to anybody at the University of Maryland?

A No, I didn't.

Q And you didn't tell that to any police officer?

A No, I didn't.

Q So, if he testifies to that, he's lying, right?

A Yes.

MR. BONSIB: Objection, Your Honor.

THE COURT: Overruled. No, I'm not going to sustain that objection. The jury is to ignore the question and the last answer. It's improper.

MR. BONSIB: Thank you, Your Honor.

BY MR. MORROW:

Q Well, if it wouldn't be a lie, is there any reason you can think of why Officer Johnson would give testimony of that nature?

MR. BONSIB: Your Honor, if he wants to bring Officer Johnson in --

MR. MORROW: I fully intend to, Your Honor.

MR. BONSIB: I wish you would.

THE COURT: I'll sustain the objection. You can bring Officer Johnson in. He's available.

THE WITNESS: Can you repeat that?

THE COURT: No. Don't answer it.

BY MR. MORROW:

Q Well, have you ever had a run-in with Officer Johnson that you cause him not to like you?

A I don't even know who Officer Johnson is.

MR. MORROW: That's what I thought. I have no further questions, Your Honor.

THE COURT: State have any questions?

MR. BONSIB: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BONSIB:

Q Mr. Gregg, you talked about having a meeting with Coach Driesell after you all left the hospital.

MR. MORROW: Your Honor, that wasn't in my recross.

THE COURT: I know it wasn't.

MR. BONSIB: Your Honor, I'll proffer to the Court --

MR. MORROW: Wait a second.

THE COURT: It's really direct testimony. I'll allow you to go back on direct and allow him to cross examine.

MR. BONSIB: Well, Your Honor, I think it's even within the scope of recross if the Court wishes for me to make a proffer at the bench. It will come out one way or the other.

THE COURT: Well, let's hear the question.

BY MR. BONSIB:

Q Mr. Gregg, did you tell Coach Driesell when you and Mr. Long met with him anything about what really happened?

A No, I didn't.

MR. MORROW: Objection.

BY MR. BONSIB:

Q Did Mr. Long?

A No, he didn't.

MR. MORROW: Objection.

THE COURT: Overruled on both objections.

BY MR. BONSIB:

Q What did you all discuss at the meeting with Coach Driesell at his house?

MR. MORROW: Objection.

THE COURT: Overruled.

A That we had been doing some cocaine that morning.

BY MR. BONSIB:

Q And who was talking to him mostly?

A Myself and Terry.

Q Okay.

And what you told Coach Driesell was a statement that you made very shortly after this whole incident occurred; correct?

A Yes.

Q And you said that you had told him that you all were using cocaine?

A Yes.

MR. BONSIB: Nothing further, Your Honor.

THE COURT: Mr. Morrow, I'll afford you the opportunity to cross examine.

MR. MORROW: Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. MORROW:

Q What time did you go over to Coach Driesell's?

A I'm not sure.

Q How much after the incident?

A About an hour. About an hour.

Q About an hour.

Did you and Mr. Long go over there together?

A No.

Q You went over separately?

A Yes.

Q You didn't have a chance to cook any story up before you went over there?

A No.

MR. MORROW: Uh huh. No further questions, Your Honor.

THE COURT: Any redirect?

MR. BONSIB: No, Your Honor.

THE COURT: All right, Now, Mr. Gregg, as I was about to tell you a while ago, there's a rule on witnesses, which means you can't discuss your testimony that you have given here in the courtroom with anybody until this trial is over. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: I'm going to excuse you out of the case unless some counsel wants to keep you; is that right?

MR. MORROW: Well, if Your Honor pleases, the only thing I would say is that I may want to recall him at some future time.

THE COURT: All right. So, you stay in contact with the State's Attorney's Office in case somebody wants you to testify later, which means I don't want you leaving town. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: All right. You got his number, Mr. Bonsib and Mr. Harding?

MR. BONSIB: He's living in the area, Your Honor. Mr. Goldstein can get a hold of him.

THE COURT: Mr. Goldstein knows how to get a hold of you. So, stay in contact with Mr. Goldstein. With that, you are excused out of the courtroom.

(Thereupon, the witness stepping down.)

MR. BONSIB: Thank you, Your Honor.

MR. MORROW: Thank you, Your Honor.

THE COURT: Who are we going to call next?

MR. HARDING: Charles Driesell.

(3)

No. 90-439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES BIAS, as personal representative
of the Estate of LEONARD KEVIN BIAS, Deceased,
Petitioner,

v.

ADVANTAGE INTERNATIONAL, INC. and A. LEE FENTRESS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

PATRICK W. LEE *
JOHN A. MACLEOD
CLIFTON S. ELGARTEN
LUTHER ZEIGLER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for Respondents*

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

The opinion below (Pet. App. 1-24) fairly sets forth the facts necessary to the disposition of this Petition.[1]

REASONS FOR DENYING THE WRIT

The Petition raises neither an important federal question nor an issue upon which the courts of appeals are divided. Applying summary judgment principles clearly articulated by the Court in its 1986 trilogy of summary

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[1] Pursuant to this Court's Rule 29.1, Respondent Advantage International, Inc. ("Advantage") states that it is a privately held corporation, with no parent or subsidiary companies (other than wholly owned subsidiaries).

judgment decisions,[2] the courts below addressed each of Petitioner's various state-law claims and found them without factual support sufficient to warrant their presentation to a jury. Notwithstanding Petitioner's suggestion that the summary judgment principles so recently enunciated by the Court are fraught with "ambiguity" (Pet. 19), and have "exacerbated, not relieved" summary judgment procedure (*id.* 18), the lower courts have, in fact, had little difficulty applying these standards. Certainly, the courts below had no problem applying these standards to the record here. Accordingly, the Petition should be denied.

A. Leonard K. Bias, a prominent basketball player at the University of Maryland, died in the early morning hours of June 19, 1986, after ingesting approximately one-third of a cup of cocaine. Mr. Bias had been celebrating with friends and teammates his recent selection by the Boston Celtics in the 1986 National Basketball Association draft. Approximately nine weeks before his death, Mr. Bias had entered into a representation agreement with Respondent Advantage for the purpose of managing his upcoming professional basketball career.

After Mr. Bias' death, his Estate (Petitioner here) brought this action seeking money damages from Respondents arising out of Respondents' alleged failure (1) to have obtained a life insurance policy for Mr. Bias before his death from cocaine intoxication,[3] and (2) to

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[3] Advantage in fact obtained a $1 million disability policy, with an accidental death rider, from Fidelity Security Life Insurance Company. (Pet. App. 5-6.) The Estate sued Fidelity when Fidelity refused to pay under the policy; the district court granted summary judgment to Fidelity because of the policy provision excluding recovery for a "drug related" death. (Pet. App. 5 n.1.) No appeal was taken from that judgment.

finalize and sign a possible multi-year endorsement contract with Reebok International, Ltd. ("Reebok") that Respondents had begun negotiating on Mr. Bias' behalf the afternoon before he died. The Estate claimed damages measured by the insurance proceeds that it would have received had such life insurance been obtained and the proceeds of what it says would have been "guaranteed compensation" under the endorsement contract that might eventually have been finalized and signed had Mr. Bias lived.

The district court granted Advantage summary judgment on the first claim on the basis of (1) uncontradicted eyewitness testimony from Mr. Bias' former friends and teammates that Mr. Bias had an extensive history of prior cocaine use, culminating in his death by self-induced cocaine intoxication (Pet. App. 29-31), and (2) undisputed expert testimony that, even if Advantage were under a duty to try to procure life insurance on Mr. Bias' behalf, this history of drug use would have rendered him uninsurable because *all* insurance companies that issue substantial term life policies inquire into such use at some point in the application process. (Pet. App. 25-29.) Petitioner did not offer any evidence to contradict Advantage's showing that Mr. Bias had, in fact, used cocaine on the numerous particular occasions cited by his teammates.[4] (Pet. App. 14-15.) Moreover, the Estate was unable to rebut Advantage's showing that Mr. Bias was uninsurable by identifying even a single insurance company that would have issued the alleged $1 million term life policy given his history of cocaine use. (Pet. App. 19-21.) Under the circumstances, both courts below held that the Estate had failed to meet Rule 56(e)'s require-

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[4] Instead, the Estate relied on generalized affidavit testimony from Mr. Bias' parents and former coach that *they* were unaware that Mr. Bias used cocaine, and on a handful of unauthenticated and unverified drug tests suggesting, at most, that on certain given days preceding the NBA draft, Mr. Bias was not under the influence of cocaine. (Pet. App. 15-16.)

ment that the nonmoving party come forward with "specific facts showing that there is a genuine issue for trial."

As to the second claim, Advantage was granted summary judgment by virtue of the admissions of the Estate's own witnesses and of Reebok officials that it would have been impossible to negotiate, finalize, and execute an endorsement agreement prior to Mr. Bias' death (even making the improbable assumptions that Respondents would have been under a duty to do so and that this contract would have contained a clause guaranteeing Mr. Bias payment even if he died the next morning). (Pet. App. 22-23.) Petitioner did not challenge these admissions or this testimony, and offered no evidentiary basis for its claim that a Reebok contract could have been negotiated, consummated, and signed overnight—*i.e.*, before Mr. Bias' unexpected death the next morning. (Pet. App. 23.) Accordingly, the lower courts likewise held that there was no genuine issue for trial as to the Reebok contract claim.[5]

B. The only federal question sought to be raised by the Petition concerns the lower courts' application of Rule 56 standards. The lower courts' judgment, however, rests on an entirely straightforward application of summary judgment principles articulated by this Court.

1. Petitioner's principal argument is that it is inappropriate to grant summary judgment where the moving party's motion depends upon the statements of witnesses who might not be believed were the case submitted to a jury. Thus, citing *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962) and certain other older cases, the Estate argues that the courts below improperly awarded Respondents summary judgment given the pos-

[5] Respondents respectfully submit that the arguments raised by the Petition concerning the Reebok contract claim (*see* Pet. 44-48) are so plainly lacking in merit as not to require a response.

sibility that a jury may have chosen to disregard the corroborated eyewitness testimony of Mr. Bias' former teammates as to his prior cocaine use. (Pet. 24-34.) Such a possibility, Petitioner contends, is in and of itself sufficient to create a triable issue under Rule 56.

This amounts to nothing more than the assertion that summary judgment can never be granted where facts are to be proven by testimony because a jury might elect to disbelieve all of the evidence favoring the moving party, even though there is nothing to contradict it. In this case, of course, the testimony of the eyewitnesses who saw Mr. Bias ingest cocaine on numerous occasions—which testimony Petitioner would apparently ask the Court to disregard and the jury to disbelieve—is corroborated by the uncontested physical fact that Mr. Bias died from ingesting cocaine.

In any event, this Court rejected an argument identical to that advanced by Petitioner in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). In that case, the Court specifically held that *Poller* does not mean that "a plaintiff may defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's [witnesses]." Noting that "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion," the Court in *Anderson* reiterated that "the plaintiff must present *affirmative* evidence in order to defeat a properly supported motion for summary judgment." *Id.* (emphasis added), quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 512 (1984). The court of appeals faithfully followed *Anderson* in rejecting this same argument below.[6]

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[6] Petitioner's reliance on *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944) (Pet. 24-29) is likewise misplaced. In *Sartor*, the

2. Alternatively, the Estate asserts that the generalized affidavit testimony from Mr. Bias' parents and his former coach that *they* personally were not aware of his cocaine use creates the necessary triable issue of fact. Citing a dissenting opinion in *Anderson* (Pet. 34), Petitioner contends that, by requiring it to come forward with specific evidence tending to contradict the specific eyewitness testimony of Mr. Bias' prior cocaine use, the lower courts held the Estate to the unfair burden of "proving a negative."

This is not what the lower courts held. They held that Petitioner must offer evidence sufficiently probative of the facts in question to create an issue for trial. Here, the evidence that Bias died of cocaine intoxication, along with the testimony that he used cocaine previously by persons who witnessed that use on numerous public occasions, showed that Mr. Bias was a cocaine user. Generalized assertions by certain individuals that they were unaware of these facts did not create a triable issue upon which a jury could properly decide that Mr. Bias was not a cocaine user.

As the Court reaffirmed just last Term, to defeat a properly supported summary judgment motion, the nonmovant must "set forth *specific* facts showing that there is a genuine issue for trial." *Lujan v. Nat'l Wildlife Fed'n*, 110 S. Ct. 3177, 3188 (1990) (emphasis added), quoting Fed. R. Civ. P. 56(e). As the Court in *Lujan* explained:

Court held merely that summary judgment was inappropriate for damages issues at a time when Rule 56(c) expressly excepted damages questions from summary judgment procedures. 321 U.S. at 624 ("Where the undisputed facts leave the existence of a cause of action depending on questions of damages which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing.") The Rule was amended two years later to clarify that summary judgment should apply to damages issues like any others. *See* Notes of Advisory Committee to the 1946 Amendment to Fed. R. Civ. P. 56(c).

> In ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' *only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant*, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint. . . . The object of this exercise is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

Id. (emphasis added). The court of appeals' conclusion that "the Estate's generalized evidence that Bias was not a drug user did not contradict the more specific testimony of teammates who knew Bias well and had seen him use cocaine on particular occasions" (Pet. App. 14) was a simple application of this well-settled rule.[7]

C. Finally, many of the arguments raised by the Petition depend upon belated assertions of fact which Petitioner concedes (Pet. 9 n.2) were *not* presented to the district court. Thus, in an effort to shore up some of the defects in its case noted by the court below (*see* Pet. 35 n.8 & note 7 *supra*), the Estate has appended to the Petition what it claims are excerpts from trial testimony given by some of Mr. Bias' teammates in a related crimi-

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[7] Nor was the Estate thereby required to "prove a negative," as the Petition suggests. In order to rebut the evidence of Mr. Bias' prior cocaine use, the Estate merely had to offer some evidence tending to show that Mr. Bias did *not*, in fact, use cocaine on some or all of the particular occasions testified to by his teammates. As the court of appeals explained:

> The Estate could have deposed Long and Gregg, or otherwise attempted to impeach their testimony. The Estate also could have offered the testimony of other friends or teammates of Bias who were present at some of the gatherings described by Long and Gregg, who went out with Bias frequently, or who were otherwise familiar with his social habits. The Estate did none of these things.

(Pet. App. 16.)

nal proceeding, although none of these materials were offered or considered by either court below. Petitioner's attempt to create factual issues in dispute by presenting evidence for the first time in this Court is plainly improper. Thus, even were the questions presented by the Petition worthy of review, it would be improvident for the Court to grant certiorari on questions that rest on extra-record assertions that were neither presented to, nor passed upon by, the district court. *See Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

PATRICK W. LEE *
JOHN A. MACLEOD
CLIFTON S. ELGARTEN
LUTHER ZEIGLER

CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500

* *Counsel of Record for Respondents*

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